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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

vs.

ANGELA LARA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED APRIL 18, 1905.

(19,713.)

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1 In the District Court of the United States for Porto Rico.

At a stated term of the district court of the United States of America, within and for the district of Porto Rico, begun and held at the court rooms of said court in the city of San Juan, in said district, on the second Monday in October, being the eleventh day of that month, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-ninth.

Present: The Honorable Chas. F. McKenna, judge.

On January 6, 1905, among the proceedings had was the rendition of a judgment in the following cause, to-wit:

ANGELA LARA
vs.
ANTONIO ORTEGA.

Breach of Promise of Marriage. Damages, $10,000.00.

Be it remembered that heretofore, to wit, on the fourteenth day of October, came the plaintiff by her attorney and filed in the clerk's office of this court a complaint in the above-entitled cause, which said complaint is as follows; to wit:

Complaint.

In the District Court of the United States for Porto Rico.

ANGELA LARA
vs.
ANTONIO ORTEGA.

Complaint.

Now comes Angela Lara, complainant above-named, by her attorney, T. D. Mott, Jr., and complains of Antonio Ortega, defendant, and for cause of complaint alleges.

I.

That the plaintiff and the defendant are subjects of the King of Spain and residents of Porto Rico.

That heretofore, to wit, on or about the first day of June, A. D. 1900, in consideration that the plaintiff, being then sole and unmarried, at the request of the said defendant, had then promised the said defendant to marry him, the said defendant, on request, the defendant promised to marry the plaintiff within a reasonable time.

II.

That the plaintiff, confiding in said promise, has always since remained and continued, and still is, sole and unmarried, and has been for and during the time aforesaid, and up to the time of the said defendant's marriage to another, as is hereinafter stated, ready and willing to marry the defendant.

III.

That the defendant afterwards, to wit, in the year 1904, married a certain other person, to wit, —— ——, contrary to his said promise to the plaintiff and to her, the plaintiff's damage in the sum of ten thousand ($10,000) dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of ten thousand dollars, and for costs of suit.

T. D. MOTT, JR.,
Attorney for Plaintiff.

That thereafter, to wit, on the twenty-third day of November, 1904, came the defendant by his attorney and filed in the clerk's office of this court a demurrer to the above complaint, which said demurrer is as follows, to wit:

3 In the District Court of the United States for Porto Rico.

ANGELA LARA
vs.
ANTONIO ORTEGA.

Breach of Promise, $10,000.00.

Demurrer to the Complaint.

The defendant, Antonio Ortega, comes by his attorney, Ramon Falcon, and demurs to the complaint herein filed by the plaintiff, and for causes of demurrer says:

First.

That the said complaint does not state a cause of action against this defendant within the jurisdiction of this court.

Second.

Because said complaint does not set forth facts sufficient to constitute a cause of action under the laws of Porto Rico.

Wherefore, this defendant demurs and prays judgment of this honorable court on each of the grounds of demurrer herein taken.

RAMON FALCON,
Attorney for Defendant.

Service of a copy of the foregoing demurrer this 25th day of November, 1904, is hereby acknowledged.

T. D. MOTT, Jr.,
Attorney for Plaintiff.

And thereafter, to wit, on December 12, 1904, an entry was made upon the records of said court, which is as follows, to wit:

No. 281.

ANGELA LARA
vs.
ANTONIO ORTEGA.

4 The court hears the argument on the demurrer to the complaint herein, W. H. Hawkins appearing for the defendant, and T. D. Mott, Jr., for the plaintiff, and overrules the same, and upon request of the defendant, he is given three days within which to answer.

Answer.

Filed December 13, 1904.

In the District Court of the United States for Porto Rico.

ANGELA LARA, Plaintiff,
vs.
ANTONIO ORTEGA, Defendant.

Answer.

The defendant answers the complaint:

I. That he never promised to marry the plaintiff.

II. That at the time mentioned as the time of the said supposed promise, and for some time thereafter, this defendant paid attentions to the plaintiff and was accustomed to visit her and her family, and at such times the plaintiff falsely, and with intent to induce the defendant to marry the palintiff, represented to the defendant that her father and mother were legally married at the time of her birth, and that she, the said plaintiff, was the legitimate child of such marriage; but the defendant alleges that her father and mother were not at that time legally and duly married, and that she was born illegitimate, and upon being informed thereof the defendant ceased his attentions to the plaintiff and refused to marry her.

III. That the plaintiff further falsely and with intent to induce the defendant to marry the plaintiff, stated her age to be five
5 years younger than that of the defendant, but the defendant alleges that her age is the same as that of the defendant more

or less by a few months only, and upon being informed thereof the defendant ceased his attentions to the plaintiff and refused to marry her.

Wherefore, the defendant demands judgment and the costs of this action.

WM. H. HAWKINS,
Attorney for Defendant.

And thereafter, to wit, on January 4, 1905, an entry was made upon the records of said court, which is as follows, to wit:

No. 281.

ANGELA LARA
vs.
ANTONIO ORTEGA.

This cause coming on regularly for trial, both sides answer ready. Whereupon comes the jury, duly impaneled and sworn, to try the issues joined, composed of the following named persons, to wit: H. W. Dooley, J. A. Wilson, F. Lecer, Jr., Nicholas Peacock, Alejandro Diaz, Enrique Pina, J. M. Torres, E. P. Kammerer, Z. Val Spinoza, Donal MacKenzie, L. H. Vendig, Carl E. Swigget, who hear all the evidence in behalf of the plaintiff.

And thereafter, to wit, on January 5, 1905, an entry was made upon the records of said court, which is as follows, to wit:

No. 281.

ANGELA LARA
vs.
ANTONIO ORTEGA.

Resumed. The jury hears the conclusion of the testimony in the case, whereupon the defendant moves for a non-suit, which motion is heard and overruled, to which the defendant excepts.

6 Thereupon plaintiff moves for peremptory instructions to the jury for a verdict in her favor, and said motion being considered is sustained. Whereupon the jury hears the argument of counsel, the charge of the court upon the question of the amount of damages they should find, retires, and thereafter returns into court with the following verdict, to wit:

"We, the jury, assess the damages in favor of the plaintiff in the sum of $5,000 (five thousand) dollars.

E. P. KAMMERER, *Foreman.*

January fifth, 1905."

And thereafter, to wit, on January 6, 1905, a judgment was entered on the records of said court, which is as follows, to wit:

In the District Court of the United States for Porto Rico, January 6, 1905.

ANGELA LARA, Plaintiff,
vs.
ANTONIO ORTEGA, Defendant.

This action came on regularly for trial. The said parties appeared by their attorneys, T. D. Mott, Jr., Esq., counsel for plaintiff, and Frank Antonsanti, Esq., for defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, with the verdict signed by the foreman, and, being called, answered to their names, and say:

7 "We, the jury, assess the damages in favor of the plaintiff in the sum of $5,000 (five thousand dollars).

E. P. KAMMERER, *Foreman.*"

January fifth, 1905.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged and decreed, that said plaintiff may have and recover from said defendant the sum of five thousand dollars ($5,000.00), with interest thereon at six per cent. (6%) per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, to be taxed by the clerk.

CHAS. F. McKENNA, *Judge.*

Motion in Arrest of Judgment.

Filed January 16, 1905.

In the United States District Court for Porto Rico.

No. 281.

ANGELA LARA
vs.
ANTONIO ORTEGA.

Now comes the defendant herein by his attorneys, Frank Antonsanti and Pettingill & Leake, and moves the court in arrest of judgment upon the verdict rendered by the jury herein on the 6th day of January, 1905, for the following reasons, to wit:

First. Because, upon the allegations of plaintiff's complaint, the plaintiff and defendant both being alleged to be aliens and subjects of the same monarch, to wit, the King of Spain, this court neither had nor has any jurisdiction to entertain or adjudicate any controversy between them.

Second. Because a verdict in favor of the plaintiff was not
8 warranted by the allegations of her complaint under the laws of Porto Rico governing the cause of action alleged, which is Section 44 of the Civil Code of Porto Rico, enacted and in force at the time said promise of marriage is alleged to have been made by the defendant to the plaintiff by virtue of an Act of the Congress of the United States, approved April 12, A. D. 1900, and entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes."

Third. Because the complaint in said cause is insufficient to base a judgment in favor of plaintiff upon, under the laws enacted by the Congress of the United States for the government of Porto Rico, and in force at the time said contract is alleged to have been made by defendant, which said laws govern the rights of the parties herein.

FRANK ANTONSANTI,
PETTINGILL & LEAKE,
Attorneys for Defendant.

Motion of Defendant for Judgment Non Obstante Veredicto.

Filed January 16, 1905.

In the United States District Court for Porto Rico.

No. 281.

ANGELA LARA
vs.
ANTONIO ORTEGA.

Now comes the defendant herein, by his attorneys, Frank Antonsanti and Pettingill & Leake, and moves the court for the entry of a *judgment non obstante veredicto* in his favor, for the following reasons, to wit:

Because, under the law of Porto Rico governing the cause of action alleged, which is Section 44 of the Civil Code of Porto Rico, enacted and in force at the time said cause of action is alleged to have arisen by virtue of an Act of the Congress of the United
9 States, approved April 12, A. D. 1900, entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," the complaint filed by the plaintiff herein does not set forth facts sufficient to constitute a cause of action against the defendant.

Wherefore, the judgment of the court should be that the plaintiff take nothing by her said suit.

FRANK ANTONSANTI,
PETTINGILL & LEAKE,
Attorneys for Defendant.

And thereafter, at the same trial term to wit, on January 20, 1905, an order was entered upon the records of said court, which is a- follows, to wit:

No. 281.

ANGELA LARA
vs.
ANTONIO ORTEGA.

The defendant in the above cause having, on the 16th day of January, 1905, filed his motion in arrest of judgment and for a judgment *non obstante veredicto* herein, to the filing of which exception was duly taken by the plaintiff, the said motions being now argued and considered by the court are severally overruled, to which several rulings the defendant by his counsel excepts.

And said defendant thereupon having presented and filed his petition for a writ of error, for the fixing of the amount of a supersedeas bond, and for extension of time for presenting and settling his bill of exceptions in this cause, it is hereby ordered that said writ of error be allowed; that thirty days from this date be given for the presentation of defendant's bill of exceptions; that the amount of the supersedeas bond be fixed at eight thousand dollars; and that upon the filing of such bond, with good and sufficient sureties to be approved by the clerk, further proceedings in this cause be stayed until the final disposition of the same in the Supreme Court of the United States.

Petition for Writ of Error.

Filed January 20, 1905.

In the United States District Court for Porto Rico.

No. 281.

ANGELA LARA
vs.
ANTONIO ORTEGA.

Comes now the defendant herein, by his attorneys Frank Antonsanti and Pettingill & Leake, and complains that in the record and

proceedings had in said cause, and also in the rendition of the judgment in the same in said United States district court for Porto Rico, at the October term thereof, A. D. 1904, against the said defendant on the 6th day of January, 1905, manifest error hath happened to the great damage of said defendant.

Wherefore, the said defendant, Antonio Ortega, prays for the allowance of a writ of error to the honorable, the Supreme Court of the United States, and for an order enlarging the time for the preparing and presenting of his bill of exceptions to the rulings of said court herein and fixing the amount of a supersedeas bond herein, and for such other orders and process as may cause the same to be corrected by the said Supreme Court of the United States.

And petitioner will ever pray.

FRANK ANTONSANTI,
PETTINGILL & LEAKE,
Attorneys for Defendant.

11 *Assignment of Errors.*

Filed March 7, 1905.

In the United States District Court for Porto Rico.

ANGELA LARA
vs.
ANTONIO ORTEGA.

Comes the defendant in the above-entitled suit by his attorneys, Frank Antonsanti and N. B. K. Pettingill, and assigns the following as the errors committed by the court aforesaid in the course of the trial and proceedings in said cause:

I.

The court erred in overruling the demurrer interposed by this defendant to the plaintiff's complaint herein.

II.

The court erred in overruling the objections made by defendant to the admission in evidence on behalf of plaintiff of the six letters set forth in the bill of exceptions in said cause, under the numbers 1 to 6, inclusive, and in admitting said letters in evidence over said objections.

III.

The court erred in refusing and denying the request, made on behalf of the defendant at the close of all the evidence in the case, that

the jury be instructed to bring in a verdict in favor of defendant, upon the grounds in said motion and request set forth.

IV.

The court erred in instructing the jury in said cause that the testimony showed beyond a reasonable doubt that a promise and contract of marriage existed, and that their consideration of the case
12 should be confined to the question of damages suffered by the plaintiff.

V.

The court erred in entering judgment in favor of the plaintiff and against the defendant, as shown by the record herein.

VI.

The court erred in denying and overruling the motion made in behalf of defendant to arrest the judgment herein.

VII.

The court erred in denying and overruling the motion made in behalf of defendant to enter a judgment in favor of the defendant *non obstante veredicto*.

Wherefore, the said Antonio Ortega, plaintiff in error, prays the honorable the Supreme Court of the United States, to examine and correct the errors assigned, and for a reversal of the judgment of the district court of the United States for Porto Rico entered in the above-entitled cause.

FRANK ANTONSANTI,
N. B. K. PETTINGILL,
Attorneys for Defendant and Plaintiff in Error.

And thereafter, to wit, on April 4, 1905, a bill of exceptions was filed in the clerk's office of said court, as of February 17, 1905, the same having been signed and approved by the court, as of that date, which said bill of exceptions is as follows, to wit:

13 *Bill of Exceptions.*

In the District Court of the United States for Porto Rico.

ANGELA LARA
vs.
ANTONIO ORTEGA.

Be it remembered that at a term of the United States district court for Porto Rico, held in the city of San Juan on the 10th day of October, A. D. 1904, a cause therein pending, wherein Angela Lara

was plaintiff and Antonio Ortega was defendant, came on to be heard before the Honorable Charles F. McKenna, judge of said court, at which time came the said parties by their respective attorneys, T. D. Mott, Jr., Esq. for the plaintiff and Frank Antonsanti, Esq. for the defendant; and thereupon the issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came and were sworn to try the said issues upon the merits of said cause in manner aforesaid joined.

And thereupon the plaintiff, to maintain the issues upon her part, called as a witness in her behalf the defendant ANTONIO ORTEGO, who, after being duly sworn, testified in substance as follows:

That he was the defendant in the suit; that his business was that of a merchant and he was a member of the firm known as A. Ortega & Company; that his age was thirty-four years; that he was born in the Kingdom of Spain; that he had known the plaintiff for more than ten years; that he had visited the plaintiff occasionally for three or four years, sometimes of his own accord and sometimes by invitation; that he did not call as the fiancee of the plaintiff but for the purpose of finding out whether the plaintiff would suit him for a wife and whether he loved her, but he never spoke to her of
14 matrimony; that on one occasion her father called to see him and witness told him that he had the best of intentions but could make no promises because he needed to know plaintiff better and see whether they agreed in character and would make a happy couple; that witness left Porto Rico in the month of June, 1903, for New York and from there went to Europe, returning to Porto Rico in October, 1904; that he married in Spain on October 6, 1904, just before returning to Porto Rico.

Witness thereupon identifies thirteen letters which are admitted in evidence and marked, numbers one to thirteen consecutively, which are offered in evidence by the plaintiff and are literally as follows:

1.

ANGELA: For a long time I have loved, and still love you with all my soul, and upon this love which up to now has laid hidden, I fix and place all the joy and happiness of my life. Can I hope that it will be reciprocated? If so, there would be realized the dearest wish of your devoted admirer.

ANTONIO ORTEGA.

Q. B. S. P.
October 13, 1894.

2.

ANGELA: Great doubts assail me because of your silence. Is it that I have had the misfortune of mortifying you with my previous letter? I pray you to answer me, and that in doing so not to forget that your enthusiastic admirer loves you as nobody else can love you.

ANTONIO ORTEGA.

15 October 16, 1894.

3.

OCTOBER 21, 1894.

ANGELA: At last, last night, your letter which had been awaited so long was delivered to me.

So you doubt of my affection, and give no credit to my words which, please believe, are no more than the pure truth declared with the frankness which is peculiar to me.

Nay, do not doubt; the affection which I profess is so true, so intense, that, in very truth, even though I should wish to do so, I could not express it; words would fail me; and may I not hope for the blessedness of its being reciprocated? I have hopes, Angela, and I have them because I conceive you to be so generous, so good, that I cannot believe you would subject me to the martyrdom which a flat negative would cause me to suffer.

This time do not make me wait so long for your answer, and may it come to take out of doubts and vacillations your very attentive and S. S. Q. B. S. P.

ANTONIO ORTEGA.

4.

AMIGUITA MIA: There was a great deal I should liked to have said to you last night when I was so fortunate as to meet, in such a casual way, you and your "sympatica", pretty and interesting sister; but the time was so short that it was scarcely sufficient to exchange the first preliminary phrases; I hope that a propitious occasion will present itself soon.

I wrote to you on the 26th, and I believe the letter is in your possession. When will I hear from you? I await news from you with impatience.

Your very affmo. S. S. Q. B. S. P.,

ANTONIO ORTEGA.

October 31, 1894.

5.

OCTOBER 26, 1894.

AMIGUITA MIA: Before all receive expressions of my gratitude for your condescension in answering my last letter so promptly. I have not been so fortunate as to convince you, and even now you have doubts which are, I must confess, very natural, but in this case, believe me, entirely groundless.

As I am new in affairs of love it is not strange that I should be awkward, and that, for this reason, I have not succeeded in making you understand that it is true affection, the affection of the soul which I feel for you; affection which, I say with all truth, dominates completely, absolutely all my being.

If you still doubt, I shall have patience, that patience which you so much recommended to me; but, at any rate, my little friend, do not fail to write to me, and do not deprive me of the great satisfaction which your letters produce.

Your very attoo and S. S., Q. B. S. P.,

ANTONIO ORTEGA.

17

6.

ANGELA: After waiting so long for your definite answer without obtaining it, I wanted, the other night, to ask you one question, only one, from the street; but, what deception! you changed your attention and turned in another direction.

I do not want to describe the sad impression produced by such contrariness; let that remain for me, since for me I have saved always my great sufferings. Have I nothing now to hope for? Goodbye, Angelita. I am always your admirer,

ANTONIO ORTEGA.

November 26, 1894.

7.

SAN JUAN, P. R., *June* 2, 1900.

Sr. Don Fernando de Lara,

MY ESTEEMED SIR: There existing a certain understanding between myself and your daughter Angelis, I deem it my duty to make you acquainted with the same, and at the same time I permit myself, duly authorized by her, to request your permission to visit the house at opportune times.

With sentiments of high consideration, I remain, your very atto. and S. S.,

Q. B. S. M. ANTONIO ORTEGA.

8.

ANGELITA: For some days I have been suffering with a bad cold, and I cannot run the risk of exposing myself to the drafts of the trolley in order to go out this night, because, as it becomes evening, I feel some fever.

18 Do not, on this account, refrain from going to the "Verbena" and ball to enjoy yourself.

I believe that by remaining in doors this evening I shall be well in the morning, since my colds do not usually last long, and I count upon being able to call at your house tomorrow or the day after at the latest.

I do not think the weather is very sure to-day, and if a shower should overtake me with the cold that I have, I might find myself in a fine fix.

Adios. Tuyo,

ANTONIO.

December 7, 1902.

9.

MY DEAR ANGELITA: When I indicated to you a few days since my intention to go to the United States I noticed the bad effect which the news caused you, and I did not desire to insist because I wanted to avoid that there should be created between us a violent situation, but the voyage being inevitable, being required by my business, the state of my health which is not very good, and my having to accompany my younger brother whom I expect to leave there for some

time in a college which I myself desire to select, it has appeared to me to be better to go aboard without saying anything to you, because by so doing we mutually avoid the sadness of the farewell which must necessarily have been very painful. But pardon me. The absence shall be short, as I shall endeavor to return as soon as possible, when this great disappointment shall remain fully compensated for. Good-by. Make my adieus to all, to your father, to your sisters, and may they all be indulgent; make my adieus also to Miguel for whose health I am so much concerned, but whom I have preferred not to see so as not to increase my sadness.

ANTONIO.

July 21, 1903.

10.

NEW YORK, *August* 20, 1903.

MY DEAR ANGELITA: I have not had humor or tranquility for anything since my arrival, and even to my own brother I have not written more than a line now and then, and not by all the steamers. I wanted, also, to know what news I could give you after consulting the physicians here, which is what, mainly, caused my trip.

I have received your little letter of the 9th inst. in which you make no mention of the unfortunate end of poor Miguel, but my brother Paco has already informed me of the same by the last steamer which arrived from there. The unfortunate news has caused me a very sad impression, and I trust you will all believe, especially poor Lola, that I join in your sorrow with all my heart, and that I lament with all my soul the irreparable loss.

Being very sick and wasted there for some time I tried to hide it and I did not complain of anything, but I felt very badly and always thought of the advantage of coming here and being examined by one of these great doctors, which, after all, I have done a little late. The doctor finds me wasted, enervated, and on the point of becoming and remaining useless, as I have already been on another occasion, if I do not submit to a radical cure commencing by getting out of that climate which is the cause of all and which is so fatal to me, and remove myself to a mild climate of Europe, where I may remain for a long time undergoing a rigorous treatment, taking baths and living a quiet and peaceful life for some time without occupying myself with anything, and avoiding all agitation and all mental labor, the only manner in which I may stop the evil, for I do not wish to become useless as I already nearly am; and I know by sad experience that it really is so, because already on another occasion I passed through the same, although by the same procedure I succeeded in recovering them, something I do not know I shall succeed in doing now, as I am now more worked. Thus, I find myself obliged to go to Europe, and as I must not lose any time I shall see a specialist in these ailments, as the doctor here has recommended to me, so that I may undertake his treatment. I go,

therefore, with my soul full of sadness and dominated by black presentiments which but increase my suffering. I do not know where, at what place, I shall definitely stop, but you will have timely news from me. Have patience and conformity that better times will surely come.

Adios. Greet in my name all in your house, and "te quiere siempre,"

ANTONIO.

11.

BARCELONA, *September* 10, 1903.

Sr. Don Fernando de Lara, San Juan, P. R.

MY VERY RESPECTABLE AND DISTINGUISHED SIR: Being obliged, by reasons of my health to remain in Europe without knowing whether I shall succeed in recovering in shorter or longer time, as I do not receive great hopes from the doctors of New York, Paris and Barcelona, and finding myself incapacitated in every way, I deem it my duty, in such lamentable situation, to make a parenthesis in my relations with your daughter Angelis, and to consider them as terminated while I find myself in the actual sad situation, to the end of not causing her prejudice for any longer time by keeping her in such an indefinite state of affairs, which I have never been able to resolve in any satisfactory manner, notwithstanding my best wishes.

I could not make her happy in my actual condition, and with great pain in my heart I deprive myself of her affection which has always been to me so ineffable. I shall always conserve her in my sad days a sweet remembrance, and I pray God to make her happy, that he may surround her with a tranquillity which now for me will never exist.

I pray you to be benevolent and to look upon me with indulgence, assured that I respect you in a high degree and that I distinguish you always.

Yours very atto., etc., etc.

ANTONIO ORTEGA.

12.

NERGA, MALAGA, *December* 29, 1903.

Sr. Don Fernando de Lara, San Juan, P. R.

MY RESPECTED AND DISTINGUISHED SIR: Under date of September 10th I wrote to you from Barcelona, which letter I suppose is in your hands, and afterwards my brother Paco informed me that you had written me in answer to the same. I must inform you that I have not received any letter from you, for which reason I have not been able, and cannot now refer to the same. Nevertheless, I feel called upon to reiterate what I have expressed to you in the letter from Barcelona above referred to because the causes which I therein mentioned or presented have not undergone any change, but, on the contrary, have become aggravated. Powerful motives prevent me

from taking to a due end the relations, which I already believed at an end, with your daughter without it depending upon my
22 will to take any different or other action.

I pray you therefore that this be understood in this way for once and all, and that I be considered as freed from all engagement which circumstances through which I am passing will not permit me to attend to.

With sentiments of the highest consideration, I remain,

Yours very atto., ANTONIO ORTEGA.

13.

NERGA, *December* 29, 1903.

MY ESTEEMED ANGELITA: Upon arriving at this town I have found various letters from you and also one from Zenaida, letters which make my days more bitter than they already are, and which I desire to answer before betaking myself to other points of Spain in search of the health lost during my long trials in Puerto Rico. As a consequence of these trials I have contracted a grave infirmity of the spine, which, according to the doctors who have seen me, not only renders it impossible for me for a long time to return to a climate such as that one, but also will never permit me to contract matrimony except it be at the cost of my health and of my life at the end. This is the pure truth, and all other things that may be talked about and what may be said there are stories and advices which must not be minded, and all which I look upon with disdain because they are entirely without any foundation.

This being the state of affairs, which I lament more than any one, I wrote in September to your father, from Barcelona, and I believed that upon the receipt of my letter everything was considered
23 as terminated as it was proper to do.

I believe there are not motives for so much alarm, for cases such as this are seen with frequency and always, generally, without legitimate and true motives such as exist in abundance in the present instance. Thus you will see that this indefinite situation in which, apparently, you desire to continue, does not in any way prejudice me, except in what it makes me suffer, but it does prejudice you, and for that reason I desire to end it.

I advise you, therefore, for your own benefit, that you completely forget me, give it all as terminated, since on my part I can do nothing in my actual situation which, if by a stroke of good luck should some day change to one more favorable, it might present things to us in a very distinct manner, and which might permit me to realize the aspirations which I have always held, but from which, unfortunately, I see myself now so distant.

In my wardrobe I left a packet of letters and some objects of yours which I tell my brother Paco to remit to you.

Adios. Forget me. Do not do nor say foolish things, and I shall always conserve a sweet remembrance of you.

Yours, ANTONIO ORTEGA.

24 Counsel for the defendant objected to the introduction of the above letters numbered from one to six inclusive on the ground that they were dated in the year 1894 without any offer on the part of the plaintiff to show any connection between said letters and those of more recent date, and on the further ground that said dates were too remote from the date of the contract as alleged in the declaration, which objections were overruled by the court. To which ruling the defendant did then and there except.

Plaintiff, further to maintain the issues on her part, was duly sworn as a witness in her own behalf and testified in substance as follows:

That she was the plaintiff in the case; that she had known the defendant since 1893; that defendant had professed love for her and had spoken to her of marriage and of the time when they would marry; that defendant wrote a letter to her father asking his permission to call at the house and that said letter was occasioned by an understanding between them; that their engagement was formally made; that defendant asked her permission to write that letter and at the time gave her his promise to marry her; that it was then that he began to call at the house, which he continued to do up to the day prior to his leaving for New York, during all of which time the defendant continued to treat her in the same way; that she never consented to the breaking off of the engagement and the first intimation she received of any such desire on his part was in the letter written to her by defendant from Spain; that then she still believed in the sincerity of the love and not only did not consent to the breaking of the engagement, but informed him of her desire to continue it; that she had made known to her friends her engagement to marry the defendant and the same was generally known publicly; that she
25 is dependent upon her father for her support; has no surplus property or estate.

Upon cross-examination, plaintiff further testified in substance that she was thirty-two years of age and that her full name was Maria Angela Tomasa; that the defendant first promised to marry her in 1899 and renewed his proposal in 1900, when she accepted the engagement and he gave her an engagement ring; that in the same year of their engagement defendant told her that he intended to marry her during the next year; that when the time set expired, he gave business excuses for not marrying until later and finally fixed the date of the wedding for July or August of the year when he left for Spain; that he was absent in Spain on a previous occasion for nearly two years from 1896 to 1898; that during that time plaintiff received no letter and had no relation of any kind with him. The witness further identified a letter written by her to the defendant, which is afterwards introduced as Exhibit "A" for the defendant.

And the plaintiff, further to maintain the issues on her part, produced as a witness José Maria Lomba, who, being duly sworn, testified in substance as follows:

That he had been a resident of San Juan, Porto Rico, for six years and was a member of the commercial firm of M. Lamba & Company; that he knew both plaintiff and defendant and that he had not heard that they were to get married, but had heard that they were sweethearts.

And the plaintiff, further to maintain the issues on her part, produced as a witness JOSEFA AGUAYO DE VENTURA, who, being duly sworn, testified in substance that she resided in Santurce, a
26 suburb of San Juan, where she had resided twelve years or more; that she knew both the plaintiff and the defendant and had heard that they were to be married; that she had first heard so in the year 1900 and many times since; that the fact that they were to marry was a subject of public knowledge and comment; that she had heard the marriage was to take place very soon, but had never heard any date mentioned and she knew of no preparation being begun for the wedding.

And the plaintiff, further to prove the issues on her part, produced as a witness JOSÉ VILASECO, who, after being duly sworn, testified in substance that he knew the defendant and was formerly employed by him in his store and also was attorney in fact for the firm up to a year ago and that he had heard the wealth of the defendant estimated at thirty to forty thousand dollars, but, in the opinion of the witness, that amount was too high.

And the plaintiff, further to prove the issues upon her part, produced as a witness FERNANDO DE LARA, who, being duly sworn, testified in substance that he was the father of plaintiff and had known the defendant for six or seven years, more or less; that he had had a conversation with defendant touching the question of marriage between defendant and his daughter in the year 1899, a few days after receiving one of the letters previously introduced in evidence; that, as his daughter had informed him that defendant had become engaged to her and intended to marry her, witness requested him to call at his house and referred to the letter which he had written and defendant then affirmed his intention of marrying plaintiff and promised witness to marry her the following year, and, as either the same
year or the following year, witness had to go to Spain, he
27 called upon defendant and in view of what had occurred, requested him to look after witness' family during his absence; that after the return of witness, defendant, on account of certain business matters, postponed the date of the wedding until the following year; that witness asked defendant in the interview aforesaid when he intended to marry plaintiff, although the latter, preceding the interview, simply asked permission to visit the house because, as defendant had addressed himself to the head of the house, it was natural to presume that he had a formal and serious intention.

And thereupon plaintiff rested her case.

Whereupon the defendant, to maintain the issues on his part, was sworn as a witness in his own behalf and testified in substance as follows:

That he was the defendant in the case and knew the plaintiff; that beginning with the year 1900 up to the time witness went to Spain, with several intervals, a friendship sprang up between them, which followed the natural course of increasing acquaintance and visiting the plaintiff by the defendant; that witness remembered the conversation he had with the father of plaintiff some days after writing the letter to him requesting permission to visit the house; that witness denied absolutely that in said conversation plaintiff's father asked him when he intended to marry plaintiff and that witness replied he would marry her within a year; and that several times before leaving for New York witness talked with the plaintiff about their courtship for the purpose of bringing the same to an end before his departure, but no definite conclusion was arrived at; that a day or two before he left for New York witness received the letter previously marked Exhibit "A," which is literally as follows:

ANTONIO: I am very much ag-rieved by your censurable conduct towards me. You well know that that is not the proper way for you to express your feelings, since extremes always appear ridiculous at the end and it would be a pity if you should come to that.

So inasmuch as some days ago I told you I was desirous of
28 speaking with you, I say to you today in writing that I wish to bring to an end a situation which is so disagreeable to me.

ANGELA.

And that upon arriving in New York witness answered the letter, which answer is already in evidence.

And further to maintain the issue on his part, defendant produced as a witness ALEJANDRO GAOS, who, being duly sworn, testified in substance that he lived in San Juan and had known the plaintiff for some time; that in a conversation at a dance in San Juan some six or seven months previous, plaintiff had stated to witness that all relations between herself and the defendant had entirely ceased; that he had never talked to the defendant about said conversation, nor with anybody else so far as he remembered; that he was a native of Spain.

And the defendant, further to maintain the issues on his part, produced as a witness FRANCISCO ORTEGA, who, being duly sworn, testified in substance that he was a brother of the defendant; that through instructions from the defendant while he was in Spain, witness returned to the plaintiff a package and also two letters, one for the plaintiff and one for her father accompanied by a letter written by witness to the plaintiff. This was during the first days of February, 1904; that before the delivery of this package and letters, the plaintiff and her father had oftentimes come to the store to ascer-

tain the whereabouts of defendant, but afterward they did not come at all nor make any inquiries; that the package contained letters and trinkets, but he did not know the contents of the letters.

And thereupon defendant rested his case and plaintiff in rebuttal offered in evidence the letter above testified to as written by
29 the witness Francisco Ortega, brother of defendant, to the plaintiff, which is introduced as Exhibit 14 for the plaintiff and is literally as follows:

SAN JUAN, P. R., *February* 5, 1904.

Sr. Don Fernando de Lara, Santurce.

ESTEEMED SIR: I have the pleasure of enclosing two letters, one for you and one for your daughter, which per S. S. "Ponce" I have just received from by brother Antonio. He charges me to send with these letters a packet which he says he left in his wardrobe, and you will pardon my not doing so because I have not found the key, but I shall look for it, and shall send you the packet tomorrow.

I am

Yours, etc., etc., FRANCISCO ORTEGA.

And further in rebuttal, plaintiff is called as a witness in her own behalf and testifies in substance that the letter previously identified by her and introduced as defendant's Exhibit "A" was written by her about four years previous and was caused by a slight misunderstanding between her and the defendant, but afterwards the misunderstanding was cleared up during one of the defendant's visits to plaintiff's house and afterwards their relations continued the same as before; that she had never had any conversation with the witness Gaos touching her relations with the defendant.

Thereupon plaintiff again rested and the foregoing constitutes the substance of all the material evidence in the case.

Thereupon the defendant moved the court for a peremptory instruction to the jury to bring in a verdict in favor of the defendant on the following grounds, to wit: First. Because no damages
30 recognized by the law had been proven. Second. Because the court has no jurisdiction of any suit where both plaintiff and defendant are subjects of the King of Spain. Third. Because under the declaration in this suit, the cause of action arose in June, 1900, at which time there was no provision in the laws in force in Porto Rico for a suit of the character set out in plaintiff's declaration, the only basis for the said suit being the provisions of Article 44 of the Civil Code then in force, which motion of the defendant was overruled by the court, to which ruling the said defendant by his counsel did then and there except.

And thereupon counsel for the plaintiff requested the court to instruct the jury peremptorily that the existence of a contract of marriage has been proven.

Whereupon the court ruled that the testimony showed beyond a reasonable doubt that there was a promise and contract of marriage and instructed the jury that their entire consideration and disposition of the case should be confined to the question of damages, if any have been sustained by the plaintiff, to which allowance of said motion and prayer of plaintiff and said ruling of the court, counsel for the defendant did then and there except.

And the said parties having so concluded and submitted their testimony in the several matters aforesaid and having by their respective counsel submitted arguments to the jury, the said judge, before said jury retired to consider of their verdict, did then and there of his own motion charge and instruct the jury as follows:

GENTLEMEN OF THE JURY: The recess taken by the court was to hear arguments of counsel on the legal questions involved in the points presented. They have been fully discussed to the court and the conclusion and rulings of the court on the questions re-
31 lieve you from the further consideration of certain questions of fact arising in this case. The court is convinced that on the evidence and the admission of letters of defendant, it has become the duty of the court to pass on the legal question involved as to whether or not the evidence shows there was an actual marriage contract entered into between the parties to this suit. The writings and oral admissions of defendant with the testimony of plaintiff and witnesses are such that I will instruct you, as a matter of law, that there has been proven an existing and continuous contract of marriage, between these parties, until broken off by defendant's marriage, and that leaves to be considered by you only the question of amount, if any, to be allowed plaintiff for the direct and compensatory damages for the breach of the contract of marriage, if found to be broken without lawful excuse or plaintiff's consent. Counsel are to be limited in their arguments to that question of the amount of damages, if any, to be allowed plaintiff for breach of the marriage contract, if you find same was in force and was violated without just cause, excuse or consent of the plaintiff.

Attention has been called by counsel of plaintiff to two other defences specifically set up by defendant acknowledging existence of promise to marry, but alleging fraud and misrepresentation in procuring the promise. Those two defences thus set up were repugnant to and inconsistent with the principal defence of defendant in absolutely denying a promise to marry plaintiff. On the defence that plaintiff's age was misrepresented a few years, the court ruled that such evidence, if believed, was not material, the proof establishing as the only cause defendant assigned verbally and in letters for the breaking off of the contract of marriage was the ill health of
32 the defendant. The other inconsistent defence was an alleged scandal sought to be introduced as relevant testimony, charging that plaintiff's parents were not married until four years after birth of plaintiff. The offer of this evidence was deemed improper and irrelevant, even if it could be proven, because such a fact

would have been no defence or justification for violation of the contract of marriage, unless alleged to have been a condition or cause of breaking of contract. Defendant refused to testify that said scandal was ever communicated to him or that it had anything whatever to do with his action in failing to marry plaintiff or in breaking off the contract. It was certainly to the credit of defendant that he did not on witness stand repeat this defence, reviving an old scandal as set up in his plea filed in the case. You will therefore dismiss from your minds the consideration of both these defences, the first as immaterial and irrelevant even if proven; the second being disproved by defendant's own testimony.

The question involved in this case of whether or not there was a contract of marriage between plaintiff and defendant, the two defences sought to be introduced by defendant to justify the abandonment and violation of the contract, have been taken from your consideration because, in opinion of the court, the proof is wholly insufficient to raise a question to submit to a jury as facts. The law authorizes the court, where testimony contradicting or denying certain facts, fails or is so insufficiently proven, to take same from the jury. Counsel for the defendant have reserved the right to except to the rulings and findings of the court and if any error is made by the court in this ruling, the exceptions thereto will enable any error to be corrected.

Therefore I have ruled that the only question to be submitted to
you is the fact of the amount of damages, if any, that this
33 plaintiff sustained by the wrongful action and breach of this
contract, and is entitled to recover under the evidence submitted to you.

It may be necessary to explain to jurors who are natives of Porto Rico, the great change that took place in the law governing this class of cases when the sovereignty of Spain over Porto Rico was ceded to and assumed by the United States. Under the former regime, the Church and State were united. Contracts of marriage and also of engagements of marriage were regulated by the Church. There were known to be two kinds of marriages, one being a canonical marriage and the other a civil marriage. The Church had its way under Spanish government of regulating the marriages. One of the familiar customs enforced by the Catholic Church was that the banns of marriage were required to be published three successive Sundays in churches of the marrying couple. If any person had an objection or claim against the proposed marriage, there could be filed with the priest of the parish a remonstrance, and he would be obliged to refuse to perform the marriage ceremony. That existed when the Church and State were united and where the people, as in Porto Rico, were then all of one denomination. Under these conditions a young man or woman would hesitate about breaking marriage engagements, because of creating an impediment to being married in the church. All that ec-lesiastical practice and rules however have now changed in Porto Rico. In Porto Rico where the Church and State have now

fortunately no connection and the laws passed by Congress of the United States and the Legislature of Porto Rico, and which latter wherever practical are to be followed and administered by the United States Court, govern and control the question of marriage contracts, as in cases of any other civil contract.

34 Therefore you are to judge and determine this case under the laws now existing. The law of Porto Rico, like the laws of the United States, regards a contract of marriage as a purely civil contract. It is to be judged by you as an ordinary contract and if it has been violated and whether a valid cause or excuse for its violation is proven. The violation of a marriage contract however, relating wholly to the tender feelings and affections and reputation and standing in society of a young woman of course carries with it a different method of considering and estimating the damages sustained from what elements are considered in an ordinary breach of a business contract. In determinating the question of damages for a breach of promise of marriage contract, we are not left to conjecture as to rules for properly determining same or of elements involved. Whilst the law of breach of promise of marriage may be, as stated, entirely new to Porto Rico, the modes of assessing damages are not new. The rules for ascertaining damages in such cases are familiar to the courts of Great Britain and to the courts of the United States. In these courts damages have been uniformly awarded for the breach of a contract of marriage when the contract is broken without cause. The courts of many States of the American Union have passed upon the question. I will read to you a quotation from decisions of the supreme court of the State of California, which has said:

"In an action for the breach of the contract of marriage, the jury may look beyond the contract itself, in assessing damages, and may give the injured party compensation for injury to the feelings, affections, and wounded pride, as well as the loss of marriage."

This tersely states the principle and rule to be followed by you in considering the facts and circumstances of the case now under your consideration.

35 As to the amount of damages, if deemed proven by the testimony, your own discretion and common sense in such a matter, under the evidence, must govern as to what you will allow for injury to those feelings, affections, wounded pride and loss of marriage of the plaintiff. It would be improper for me to intimate how much should be allowed. It is for you alone, for your exercise of sound discretion to decide how much is fairly and reasonably due the plaintiff under the evidence for any direct pecuniary damages and for any compensation to her feelings and pride, and it is your duty to decide that in this case, as also to consider as an element of damage plaintiff's loss of marriage, defendant's circumstances and prospects being elements for your consideration of this phase of damages.

It is allowed in these cases for plaintiff to prove that the engagement and marriage contract was so well known that it became a

matter of public reputation and repute in the family circle. There was an existing engagement as the testimony, as previously ruled on, established verbally in addition to the voluminous correspondence introduced in evidence. The testimony further tends to prove that the bridesmaid and groomsman were selected, as that it is the custom in Porto Rico to choose these parties to assist at weddings by the mutual consent of the parties to be married. Under the testimony this would tend to prove the wide publication of the marriage. All these would tend to prove elements of pain and mortification and wounded pride sustained by plaintiff. In estimating the damages to be awarded for the violation of this contract by this defendant, all these are elements for your consideration. You are to especially take into consideration testimony tending to prove the publicity, the length of time of the marriage engagement and the
36 exclusive attention that the defendant paid to plaintiff. You may consider plaintiff's testimony tending to prove that, even though defendant's health was believed by her to be failing and likely to be incurable as he had written her from Europe, notwithstanding all this, she remained attached to him and had no idea of releasing him as he had requested in letters because of failing health. Plaintiff testified that the invalid condition of defendant added to her affection and increased her sympathy and that she sincerely believed defendant's letters. All this enters into the case. It is mentioned because if you believe plaintiff's testimony, the unexpected violation of the marriage contract of defendant by his letter from Europe to plaintiff's father and also to plaintiff, demanding his release from the marriage engagement, is a matter that of course leaked out, became known in the community, became publicly known, and of course would naturally be discussed in the community. This is a matter for you to consider as an element in the case whether such action was or was not a severe blow to the young lady, calculated to cause her pain, suffering and humiliation and to wound her pride, not to mention her loss of marriage to defendant, a reputable and prosperous business man, as the testimony tends to establish.

You witnessed the deportment of the young lady, plaintiff, as a witness, saw her behavior, her manner, her action throughout, and it is for you to judge therefrom of her refinement and sensitiveness, and it is for you to draw conclusions as to the truth of her statement, whether or not, as the testimony tends to prove, her feelings and her sensibility were seriously affected by the conduct of defendant in the matter of violating the contract of marriage.

The alleged failing health of this defendant, if believed by you, would be proper for you to consider as an element to mitigate
37 damages. The letters of defendant indicate that his failure of health was the only reason that he ever alleged for the desire to be released from the contract of marriage with plaintiff. You have, notwithstanding the persistence with which defendant alleged orally and by letter his total failure of health, incapacitat-

ing him from entering the state of matrimony with plaintiff, that inside of a year he was married to another lady. It is for you, under the evidence, to determine whether these letters of defendant to plaintiff, setting up the terrible condition of his health, were true at the time or manufactured by defendant and to deceive and defraud plaintiff into giving him a release. If the defendant was in fact in as bad health as his letters described and he was now in court a broken down confirmed invalid, it would then be a matter for you to consider in connection with amount, if any, of damages to be awarded for defendant's breach of contract. Whether the contents of those letters written to this lady and read to you were true or were false and manufactured and were a part of a trick and deception of defendant, it is for you to consider in connection with the question of damages. If the defendant's letters read to you are believed by you to be true and not wilfully exaggerated to mislead and deceive plaintiff into giving defendant release, it would be proper to give defendant the benefit of such belief and to find that the damages should be mitigated.

Testimony was introduced by plaintiff as to reputation for wealth and ability of defendant to pay the damages. By the law it is permissible to prove defendant's reputation for wealth. You recall the testimony introduced on that subject and you will take that into consideration on your assessment of the amount of damages, if any is to be awarded by you to plaintiff.

38 Law points or instructions have been prepared by counsel on both sides.

The court is asked by the plaintiff to state that as a matter of law, an agreement of marriage, while it relates primarily to the affections, to the joys and sorrows, and to the solace of domestic life, still it is in law considered as a contract of value, and that a breach of it without a justifiable cause or without the consent of the other party thereto, gives said other party a right to ask for damages for the breach of said contract. The law, under those circumstances, requires the party from whom the injury proceeds to compensate the suffered, not by the exact and precise damages which are given for the refusal to pay money, to convey property, or to perform services, but by such estimated damages as a jury, looking at all the circumstances of the case, may deem just.

That is a quotation taken from Bishop on Marriage and Divorce, a leading authority on the subject. This point is affirmed.

(2.) The court instructs you further that there are two elements which the jury must take into consideration in a case of this sort in making up its verdict of damages:

First: It estimates the plaintiff's pecuniary loss precisely as in a suit on ordinary contract.

Second: Then adds thereto whatever, under the circumstances, is deemed just for the resulting mental suffering.

As to the first of these elements, the damage which the law affords for a breach of contract of this sort should be apportioned to the

benefits lost by the breach, and to the advantages which would result from performance. For this purpose the pecuniary position of the defendant and the consequent benefits of the marriage the
39 fact that the female plaintiff has no independent means, and any other matter of a like sort may be taken into consideration by you.

Answer. This is affirmed. In this character of cases, as I stated a moment ago, you cannot produce a bill of items and say we have suffered this amount of damages. The law implies damages from the wrongful violation of such a contract as this. It is a wrong and wherever a wrong is done the law implies damages.

As to the second element, the wounded feelings and affections consequent upon the breach are elements of damage, and the court instructs you further that if you find from the evidence that the plaintiff, relying on the man's promise, announced the fact of an engagement to her friends and it became generally known to the family circle and to the public, this is an additional consideration which may be taken into consideration by you to increase her damages.

Answer. Affirmed.

As to the defendant's general reputation for wealth, that is also a subject to be considered by you. His social position in the community where he lives and the length of the engagement are all elements. And the correlative loss sustained by plaintiff in not securing advantages of marriage to defendant.

In speaking as to the element of damage, the court instructs you further that you may take into consideration in estimating the damages that the plaintiff is entitled to in the event that you find from the evidence that a contract of marriage existed between the plaintiff and defendant, and that the defendant has broken the same without the consent of the said plaintiff, or without any justifiable cause:

1st. The defendant's general reputation for wealth.

2nd. His social position.

40 3rd. The length of the engagement.

4th. The depth of the devotion.

5th. Her lack of independent means.

6th. Her mortification and injured feelings and affections.

7th. Her loss of reputation.

8th. Her altered social condition in relation to her home family, due to his conduct.

9th. And lastly the loss of a permanent home.

Answer. All that is affirmed. These circumstances enumerated are all for you to consider.

The defendant asks the court to give the following instructions.

Mr. ANTONSANTI, attorney for defendant: I don't think any instructions asked by defendant are applicable in view of the rulings of the court.

The COURT: Do you therefore ask leave to withdraw them?

Mr. ANTONSANTI: Yes, sir.

The COURT: In conclusion, I wish to say that, whilst this case nat-

urally arouses sympathy and also possibly indignation, you are not to be governed by such feelings in your verdict. The testimony before you must be your sole guide in reaching a verdict

Having answered all the instructions submitted in this case by plaintiff's counsel, and, in doing so, having covered the principles and rules governing your consideration of the evidence in this case to enable you to reach a determination, it is probably sufficient if I conclude my remarks to you by simply recapitulating briefly the principles involved and which should govern you in the application of the evidence.

By the ruling of the court already stated, that, as a matter
41 of law under the evidence, the court should take from the jury the facts as established by the evidence. First. That there was a lawful marriage contract proven by the verbal and written evidence in this case, which contract was violated by the marriage of the defendant to his present wife, thus completing the breach of contract for which this action lies and for which breach, like the breach of any other contract, defendant becomes liable to the plaintiff in the absence of proof of any justification for the violation of the contract, to all damages that result from the violation of the contract.

It will be observed, as already stated, that the sole defence insisted upon by the answer and proof of defendant is not that he was justified in breaking the contract in evidence or that any circumstances occurred tending to excuse his non-performance thereof, but he relies wholly on his denial of any promise or engagement at any time to marry the plaintiff, as alleged. Therefore, in the absence of any defence or justification excusing defendant from non-performance of his contract, under the ruling of the court already made that the contract and its breach by the marriage of defendant has been as a matter of law duly established, your duty is limited to the determination of whether this plaintiff has sustained any damages whatever through the breach of contract by defendant, and if so, the amount to which she is entitled to compensate her for the same. Damages for breaches of contracts of marriage may be allowed for what is called the direct or pecuniary damages in a case where the plaintiff has incurred expenses and outlays in preparing for a marriage and the necessary trousseau and incidental expenses. In this case there is no proof that

I recollect for submission to you showing that plaintiff in-
42 curred any expenses or paid out any money or sustained any pecuniary loss in expenses of preparation for a marriage, and therefore this character of damages under the evidence is not for your consideration.

Compensatory damages are by law allowed in a case like the present where the evidence tends to prove injury to the feelings, and affections and consequent suffering by plaintiff from the mortification and disgrace attendant upon the breaking off of the marriage engagement without cause; and also is for your serious consideration, under the evidence, in the same connection, allowance for the loss of the

value of a desirable marriage to plaintiff and any financial or social advantages which the evidence or the circumstances of the case show likely to accrue to the plaintiff as a result of a marriage to defendant, which items and considerations and evidence bearing on same are wholly for your consideration, they having been enumerated at length in the instructions.

A third character of damages is recognized by courts and allowed by the law where marriage contracts are shown by the evidence to be violated flagrantly, wantonly, maliciously, wrongfully and with a reckless disregard of the feelings and rights of a party to the contract, and in such cases damages are allowed because the character of these cases is in the nature of a tort.

Punitive or exemplary damages are also sometimes called "smart money" and are recognized by the law as having for their object to enforce and teach a lesson to ones who may unjustifiably and wantonly violate a marriage contract, that the law and rights of a person cannot be violated with impunity and to show that even in the case of the weakest or humblest individuals, their rights, their feelings, their property and their person are sacred and are in law to be
43 protected and vindicated.

I do not wish you to infer from my mentioning the above rule that this is such a case as to warrant the application of punitive damages. It is for you as the jury, under all the evidence adduced and all the circumstances in the case, to carefully consider whether from the facts in evidence the allowance of any punitive damages would be warranted by the evidence, taking into consideration defendant's financial circumstances as shown by the testimony.

You will therefore be careful to draw no inference from this definition of punitive damages as conveying the opinions of the court on the evidence. If such inference is warranted by any remarks made by the court, you will disregard such remarks, as the facts and evidence are wholly for you. You will apply the evidence under the instructions of the law and use your sound discretion and judgment as to what amount, if any damages, is to be allowed the plaintiff in this case, taking into consideration the testimony and regarding, as stated, defendant's financial reputation and limited capacity to pay. All of which elements, as stated, enter into the determination of this case under the sound discretion which you are required by law to use in disposing of this case.

And the said jury, having heard the evidence, the charge of the judge and the various matters aforesaid, retired to consider of their verdict and thereafter returned into court a verdict in favor of the plaintiff, assessing her damages at the sum of Five Thousand ($5,000.00) Dollars, as more fully appears in the record of said cause.

And for as much as the matters above set forth do not fully appear of record, the defendant tenders this his bill of exceptions and prays that the same may be signed by the judge of
44

this court pursuant to law, which is done accordingly this 17th day of February, A. D. 1905.

CHAS. F. McKENNA, *Judge.*

45 In the District Court of the United States for Porto Rico.

ANGELA LARA, Plaintiff,
vs.
ANTONIO ORTEGA, Defendant.

I, H. H. Scoville, clerk of the district court of the United States for Porto Rico, do hereby certify the foregoing forty-four typewritten pages, numbered 1 to 44, inclusive, to be a true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed error is $23, and that said amount was paid by Frank Antonsanti and Pettingill & Leake, attorneys for plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this sixth day of April, A. D. 1905.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk of the District Court of the United States for Porto Rico.

46 UNITED STATES OF AMERICA, *ss:*

To Angela Lara, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the distr-ct court of the United States for Porto Rico, wherein Antonio Ortega is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles F. McKenna, judge of said district court of the United States for Porto Rico, and the seal of said court, this 24th day of January, in the year of our Lord one thousand nine hundred and five.

[Seal United States District Court for the District of Porto Rico.]

CHAS. F. McKENNA, *Judge.*

Attest:
H. H. SCOVILLE, *Clerk.*

46½ *Return on Service Writ.*

UNITED STATES OF AMERICA, *The District of Porto Rico, ss:*

I hereby certify and return that I served the annexed writ on the therein-named Angela Lara by handing to and leaving a true and correct copy thereof with Thos. D. Mott, Jr., her attorney of record personally at San Juan, in said district on the 27th day of January, A. D. 1905.

E. S. WILSON,
U. S. Marshal.
—— ——,
Deputy.

47 [Endorsed:] U. S. district Ct. for P. R. Angela Lara *vs.* Antonio Ortega. Citation. Marshal's fees: 1 service, $2.00. Expenses—

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court of the United States for Porto Rico, before you, between Angela Lara, plaintiff, and Antonio Ortega, defendant, manifest error hath happened to the great damage of the defendant, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Charles F. McKenna, judge of the district court of the United States for Porto Rico, the 24 day of January, in the year of our Lord one thousand nine hundred and five.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk U. S. District Court for Porto Rico.

Allowed, to operate as a supersedeas, this 24 day of January, A. D. 1905.

CHAS. F. McKENNA, *Judge.*

49 [Endorsed:] No. 281. U. S. district court for P. R. Angela Lara *vs.* Antonio Ortega Writ of error Certified copy hereof filed in my office on Jan. 24, 1905. H. H. Scoville clerk dist. court of U. S. for P. R.

50 [Endorsed:] No. 281. In the district court of the United States for Porto Rico. Angela Lara *vs.* Antonio Ortega.

Endorsed on cover: File No. 19,713. Porto Rico D. C. U. S. Term No. 230. Antonio Ortega, plaintiff in error, *vs.* Angela Lara. Filed April 18th, 1905. File No. 19,713.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 230.

ANTONIO ORTEGA, *Plaintiff in Error*,

vs.

ANGELA LARA, *Defendant in Error.*

ERROR TO THE UNITED STATES DISTRICT COURT FOR PORTO RICO.

STATEMENT OF FACTS.

This was an action for breach of promise of marriage brought in the court below by the defendant in error by complaint filed on October 14th, 1904, wherein the plaintiff alleged that both parties were subjects of the King of Spain residing in Porto Rico; that about the first day of June, in the year 1900, in consideration of the promise of the plaintiff to marry the defendant on request, the defendant had promised to marry the plaintiff within a reasonable time; that the plaintiff, confiding in said promise, still remains single and up to the time of defendant's marriage with another was ready and willing to marry defendant: that the defendant, contrary to his said promise to plaintiff, married in the year 1904 another person to the damage of the plaintiff in the sum of $10,000. (Record, pages 1 and 2).

To this complaint the defendant demurred on two grounds: first, that the court had no jurisdiction of the action, and second, that the complaint did not state facts sufficient to constitute a cause of action under the laws of Porto Rico. (Record, page 2). This demurrer was overruled (Record, page 3), and the defendant then answered, denying the promise alleged and stating other matters of defence which need not be detailed, as they are not material to the questions raised before this court. (Record, page 3). The case was tried in regular course and on the 5th of January, 1905, a verdict was returned in favor of the plaintiff in the sum of $5,000, (Record, page 4) upon which final judgment was entered. (Record, page 5). At the conclusion of all the evidence the defendant moved that the plaintiff be non-suited, which motion was overruled, and the plaintiff moved that the jury be peremptorily instructed to find a verdict in her favor, which motion was granted. (Record, page 4).

Thereafter during the same term of the court the defendant filed two motions, one in arrest of judgment *non obstante veredicto*, (Record, page 6), both of which raise the same questions raised by the demurrer to the complaint but more specifically, especially in regard to the sufficiency of the complaint to state a cause of action, making express reference to the Section of the Civil Code of Porto Rico which defendant claimed governed the rights of the parties under the alleged contract, and expressly claiming that said Civil Code had become a Law of Congress by its adoption in the Act of April 12, 1900, which created a civil government for Porto Rico. These two motions were considered and overruled by the court, to which defendant's counsel excepted (Record, page 7) and

thereafter sued out a writ of error from this Court, and obtained the approval and certification of a Bill of Exceptions to the proceedings during the trial. (Record, pages 9-28.)

The errors assigned by plaintiff in error, defendant below, (Record, pages 8 and 9) are the following:

1. In overruling the demurrer to the complaint.
2. In overruling the objections to the admission of six certain letters offered in evidence on behalf of plaintiff.
3. In denying the motion of defendant, made at the close of all the evidence, for a peremptory instruction in his favor.
4. In instructing the jury that the testimony showed beyond a reasonable doubt the existence of a marriage contract and that the jury should confine their consideration to the subject of the amount of damage suffered by plaintiff.
5. In entering judgment in favor of plaintiff and against defendant.
6. In overruling the motion made by defendant to arrest said judgment. And
7. In overruling defen lant's motion for judgment in his favor, *non obstante veredicto.*

ARGUMENT.

The first, third, fifth, sixth and seventh assignments of error involve the two questions of the jurisdiction of the court below and the construction of the Section 44 of the Civil Code of Porto Rico, claimed to be a Federal Law by adoption, upon which the jurisdiction of this court to review the judgment of the trial court is based; hence it may be well to consider those questions

first, and all the above assignments can logically be discussed under two heads: (a) the jurisdiction, (b) the Federal question.

I

The question of jurisdiction is a doubtful one in the mind of counsel and, if of a different character, would not be urged in view of the other circumstances of the case. But as that question is one which is always open, and one which this court always considers *in limine* in cases of doubt, we briefly submit the line of thought upon which the objection was founded, by the counsel then representing the defendant in the trial court.

It may be taken for granted that no jurisdiction of a controversy between these parties, both being aliens and subjects of the same Monarchy, would exist in the Constitutional Courts of the United States existing within the States. By the Civil Government Act (of April 12, 1900) under which the trial court was created (Section 34) that court was given the combined jurisdiction of the Constitutional courts known as United States Circuit and District Courts; but by an amendment of the above Act, approved March 2, 1901, the jurisdiction of said trial court was enlarged in two respects: first, by reducing the jurisdictional amount in controversy to $1000, and second by making it "extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States".

It has often been contended that this language, while not entirely plain, should be construed in the light of the jurisdiction as it previously existed requiring a *diversity of citizenship*, and only extending the limits within which such diversity

might exist—thus preserving the basis of reasoning on which the Federal jurisdiction has always been recognized as resting. But however this may be, a special provision and exception seems to have been made in the case of Spanish subjects resident in Porto Rico by the Treaty of Peace of 1899 between the United States and Spain (Vol. 30, Stat. at Large, p. 1754). Article Eleven of that Treaty is as follows:

> "The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignity shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong."

So far as our investigation has extended, this treaty provision has never been construed by any court of high authority, but under the construction given it by the Department of Justice (Op. of Attys. Genl., Vol 23, page 93) and by the War Department (Magoon's Repts., page 475) it seems intended to give to Spaniards greater rights than enjoyed by other foreigners and, in case of being sued, a right to select the tribunal before which their rights are to be determined, a least to the extent of electing the local courts as a native citizen might do whenever he so desired. If that be the correct construction, we submit that the plaintiff in error in this case had a right to object to be judged by the trial court and to insist upon his right to be sued in the Insular courts, especially where the other party was one of his own nationality. And if the Act of Congress can be so construed as not to interfere with this treaty provision, we believe such construction will be favored.

United States vs Lee Yen Tai, 185 U S. 221.

II.

The judgment against the defendant in this case "not exceeding" five thousand dollars in amount, a writ of error would not lie from this court were not a bona fide question of jurisdiction of Federal law involved. We have discussed the question of jurisdiction above, and we also contend that all the assignments hereinbefore specifed involve the construction and application of a Federal law in so far as Section 44 of the former Civil Code of Porto Rico is concerned. This contention is based upon the provisions of Section 8 of the Civil Government Act above referred to. That section provided as follows:

> "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended or repealed by the legislative authority hereinafter provided for Porto Rico or by Act of Congress of the United States;" etc.

It will not be contended that said Section 44 (which we shall hereafter quote) was not in force at the time of the adoption of the above Act of Congress, nor will it be contended that the same was either "altered, amended or repealed" until the adoption of a new Civil Code by the Legislative Assembly of Porto Rico in the year 1902. As the complaint in the case alleged that the contract was entered into between the parties in the year 1900, we therefore submit that the Section in question was a law by virte of its adoption by reference in the above Act of Congress of April

12, 1900, and its construction as applicable to that contract is the construction of a Federal law.

That the adoption of a law, or a system of laws, by reference has the same effect as though incorporated bodily into the Act of adoption has been repeatedly decided. To this court we need only cite two of its own decisions which have long stood unchallenged:

United States vs Simms, 1 Cranch 252
Kendall vs United States, 12 Peters 524

In the latter of these cases, at page 625, Mr. Justice Thompson used the following language:

> "It was not an uncommon course of legislation in the States at an early day to adopt, by reference, British statutes; and this has been the course of legislation by Congress in many instances where State practice and State process has been adopted. And such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law, and would be adopting prospectively all changes that might be made in the law. And this has been the light in which this court has viewed such legislation. In the case of Cathcart vs Robinson the court, in speaking of the adoption of certain English statutes, say, by adopting them they become our own as entirely as if they had been enacted by the legislature. We are then to construe this third section of the Act of 27th of February, 1801, as if the eleventh section of the Act of 13th of February, 1801, had been incorporated at full length", etc.

Having, as we believe, proven our proposition that the Section of the old Civil Code in question is a Federal law by adoption, we now submit that the plaintiff in error was unjustly deprived of the benefit of its provisions in the case at bar. This Section (44) reads as follows: (Official Translation of War Dept., 1899)

"If the promise (of marriage) has been made in a public or private instrument by a person of age, or by a minor in the presence of the person whose consent is necessary for the celebration of the marriage, or when the banns have been published, the person who refuses to marry, without just cause, shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage. An action to recover indemnity for the expenses to which the foregoing article refers may be instituted only within a year, counted from the day of the refusal to celebrate the marriage".

The question of the application of this law as a defence was raised generally by the second ground of the demurrer to the complaint (Record, page 2), and specifically by the motion to direct a verdict for defendant (page 19), the motion in arrest of judgment (page 5) and the motion for judgment for defendant *non obstante veredicto* (page 6). And if applicable, the rulings were clearly wrong, as neither in the complaint nor in the evidence was any reference made to the plaintiff having incurred any expense "by reason of the promised marriage". It is clear not only from these rulings but from the charge to the jury that the court refused absolutely to apply the provisions of this statute, as in his charge the court specifically instructs (Record, page 25) as to the elements which the jury is allowed to consider in estimating damages—and which they must have considered in arriving at such an enormous verdict.

It may be argued that the Federal question was not raised at the proper time or in a proper way, as it was too late to do so by the motions in arrest of judgment and for judgment *non obstante;* but there are two answers to this argument: first, that the question was certainly properly raised by the motion to direct a verdict at the con-

clusion of the evidence, and second, that it is sufficient if a decision by the court below upon the Federal question appears anywhere in the record.

Neilson vs Lagow, 12 How. 98
Armstrong vs Treasurer, 16 Pet. 281

It may also be contended that no Federal question was involved in the trial in the court below. But if our contention is admitted that the Section 44 of the Civil Code had become a Law of Congress by adoption, it must follow that the controversy involved the right claimed by this plaintiff in error under "a law of the United States" and "upon the determination of which the result depended," and the right was denied.

Act. of Congress of Apl. 12, 1900, Sec. 35
W. U. Tel. Co. vs Ann Arbor R. Co., 178 U. S. 239.

And it need only appear that the Federal question was distinctly raised, that it was set up in good faith, and that it was not frivolous.

Ill. Cen. R. R. Co. vs Chicago, 176 U. S. 646, 656.
Burton vs United States, 196 U. S. 283.

III

Was, then, this Section 44 of the Civil Code, above quoted, properly applicable to determine the rights of the parties under the contract set up in the complaint? If so, the court clearly erred in refusing to apply it, and erred to the manifest and vital prejudice of the plaintiff in error.

We submit that parties are supposed, in the

view of the law, to enter into contracts with a view to their rights and liabilities at the time the contract is entered into, and not what may be their rights or liabilities under the changing laws of the future; that the degree of liability is as much an integral part of the contract as the degree of right; and that when that degree of liability is fixed by law it is as much a part of the contract as when it is fixed by the parties themselves in their contract- as is usually the case—and we see no reason why this elementary rule should not be as applicable to the engagement to marry as to other contracts.

Counsel will probably argue, as was argued in the court below, that the Section in question affects only the extent of the remedy for the breach; but that seems to us a position utterly untenable and one which misapprehends the distinction between matters of right and of remedy.

It is sufficient to state the proposition that parties are conclusively presumed to know the law applicable to their contracts and, when any law affects or governs rights or obligations under such contracts, such law is read into them and made a part thereof to the same extent as if the parties had recited them therein. If that is so, let us suppose that these parties, instead of leaving the question of liability for breach to the law itself, had specifically agreed between themselves to the same effect, that is, that in case of breach of the promise on the part of either, the other should have only a claim for expenses actually incurred in preparing for the marriage. Could it then be contended that a subsequent law, which attempted to vary the agreement so expressly made and to increase or diminish the liability on either side, would merely vary the remedy and

not the substance of the contract itself? The statement of the proposition is its own answer-and the confusion of counsel for plaintiff below, in which he induced the court to follow him, very largely arose from this fact of the provision governing the extent of the obligation in case of breach being expressed by statute instead of in the contract itself.

For decisive authority on this question there is need to look no further than the decisions of this Court where the principle has been applied to varying circumstances.

The case of COGHLAN VS. SOUTH CAROLINA RAILROAD CO. was a suit to recover upon certain bonds of the defendant corporation, made payable in England, and the question was what rate of interest was to be paid after maturity, the bond itself being silent upon that subject. The court says:

> "Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate, seven per cent, fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law *was in the view of the parties when the contract was executed*. For, as said by Chief Justice Marshal in Wayman vs Southard, 10 Wheat. 1, it is a principle, universally recognized, that 'in every forum a contract is governed by the law with a view to which it was made'. And by Lord Mansfield in Robinson vs Bland, 2 Burr. 1077: 'The parties had a view to the law of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed' etc * * Referring to these and many other cases, this court, speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard vs Norton, 106 U. S. 124, that the law upon which the nature, interpretation and

validity of a contract depended, was that which the parties, either expressly or presumptively, *incorporated into it as constituting its obligation.* This doctrine was reaffirmed in Liverpool etc. Co. vs. Phoenix Ins. Co., 129 U. S. 397, where it was said that, according to the great preponderance, if not the uniform concurrence of authority, the general rule was, 'that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view'* * * * * * What law, then, did the parties have in view *as determining the legal consequences resulting form the non-performance of the contract between them?* Presumptively, the law of England where the contract was to be entirely performed".

Coghlan vs. South Carolina R. Co.,

142 U. S. 101' 107.

The same question contained in the final paragrah above quoted, if asked in the case at bar, might be similarly answered: "Presumptively, the law of Porto Rico at the time the contract was made."

So, in a very late decision this court has reaffirmed the principle in the following language:

> "It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties."

McCullough vs Virginia, 172 U. S. 102, 112.

This court has also in several cases discussed and explained the difference between the right or obligation of a contract and remedy, which latter only can be changed by subsequent legislation Following are quotations from some of the most pertinent:

> "If the laws of the State passed afterward had done nothing more than change the remedy upon contracts

of this description, they would be liable to no Constitutional objection. For, undoubtedly, a State may regulate at pleasure the mode of proceedings in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall like wearing apparel, not be liable to execution on judgments. * * * * * * * * Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself * * * When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured by the rules above stated. They were the laws of Illinois *at the time*; and therefore, *entered into the contract, and formed a part of it*, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery. Yet no one doubts his right or his remedy; for, by the laws of the State then in force this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus adquired, impairs the obligations which the contract imposed."

Bronson vs Kinzie et al, 1 How. 311, 315, 319.

"Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the

principles of the common law, it is not competent for the legislature to take it away. A vested right *to an existing defence* is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract, and are not based on equity and justice "

Pritchard vs Norton, 106 U. S. 124,132.

The following cases show that, where the burden or liability in case of non-performance is increased, the change is of the obligation and not of the remedy :

" Assuming, as we have a right to do, that these known and established principles of law form a part of the written conditions of the bond, it is not easy to perceive how a chancellor could interpose in the latter case, more than in the former, without disregarding the terms of the contract, and extending the liability of the surety beyond the letter and spirit of his bond."

United States vs Price, Ex'r., 9 How. 83,91.

" What the Act of 1888 does is to give a parish or municipal corporation an additional and more summary remedy for the enforcement of the obligation of any contract relating to the paving, repairing, reconstructing, or care of its streets, highways, bridges, culverts, levees, canals, ditches, or crossings. It does not enlarge the obligation assumed by the defaulting corporation, nor impose new burdens upon such corporation, but only enables the other party to the contract, the public, as represented by the parish or municipality, to compel the performance of that obligation ."

The New Orleans etc Co. vs Louisiana. 157 U. S. 219, 234.

The Act af 1888, referred to in the last quotation, was an Act of the Legislature passed after the making of the contract with the complaining Company whereby the municipalities were allowed a remedy by Mandamus to compel the Company to continue the performance of its contract, which

involved the public safety. The court held that such Act gave only an additional remedy and did not increase or vary the *obligation or liability* fixed by the contract at the time it was made; but plainly intimates that, had it done so, it would have been invalid.

In the case at bar, counsel for defendant in error claimed that the liability of plaintiff in error for breach of his alleged contract to marry was governed by the law in force at the time of the breach—and that contention was supported by the court.

That law was the general provision for damages for breach of contract contained in Section 1068 of the new Civil Code of Porto Rico, enacted by the Legislative Assembly thereof in 1902, which Section read as follows:

> "Those who in fulfilling their obligations are guilty of fraud, negligence or delay, and those who in any manner whatsoever act in contravention of the stipulations of the same, shall be subject to indemnify for the losses and damages caused thereby."

It is evident from the wording of this Section, in connection with the construction put upon it by the court as shown by that part of the charge enumerating the elements of damage which the jury should consider (Record, page 25), that the law as changed by the legislature after the making of the contract alleged in the complaint as in 1900 grievously "enlarged the obligations" of nonfulfilment and "imposed new burdens" which were not within the contemplation of the parties when the contract was made, if it in fact was made as alleged. In other words, it gave to defendant in error a larger right of recovery than she had ever anticipated, or could have anticipated at the time of entering into the contract.

We therefore insist that the various assignments of error covering the non-application of said Section 44 of the old Civil Code to the contract in controversy, the same being the Federal question involved, are well taken and should be sustained.

IV

While the right of review in this court over judgments and decrees of the District Court of the United States for Porto Rico is not governed by the provisions of the Courts of Appeals Act of 1891, but by Section 35 of the Civil Government Act relating to Porto Rico, hereinbefore cited, we believe that by analogy the same rule should prevail that, given the jurisdiction by the presence of a Federal question, the court will not confine itself to a review of that question but will re-examine the whole case upon its merits, and consider all errors properly assigned.

Holder vs Aultman 169 U. S. 88

Burton vs United States, 196 " 283

We therefore proceed to discuss briefly the other errors assigned, though firmly believing that the errors already discussed will necessitate the reversal and dismissal of the case.

V

The consideration of the second error assigned will require little discussion. It brings before the court the objection made (Record, pages 10-12 and top of 16) to the introduction in evidence before the jury on the part of plaintiff below of the six letters referred to in the assignment. A perusal of the bill of exceptions will show that these letters are all dated in the year

1894, that no other letters were produced of a date earlier than 1900, and that no evidence of any kind was produced connecting these earlier letters with the alleged promise of marriage in 1900. We therefore submit that their introduction was subject to the objection made, and that, by tending to induce the jury to believe that a long courtship had intervened, their admission in evidence was greatly prejudicial to plaintiff in error.

VI

The remaining assignment to be considered is the fourth, which covers the rulings of the judge at the trial that the existence of a contract to marry had been proven and a peremptory instruction was given to find in her favor, leaving to the jury nothing but the determination of the amount of damage (Record, pages 4,19 bottom, 20 and 21); the language of the court as stated at the top of page 20 being that such contract "had been proven beyond a reasonable doubt". Such an expression in a civil case merely shows, in the judgment of counsel, how far the trial judge had permitted his prejudices in the case to sway him.

The evidence on behalf of plaintiff below consisted of certain letters, which certainly were not very definite and contained nothing determinative of the question, and the testimony of plaintiff and members of her family, the only direct testimony of a promise being from the plaintiff and her father. The defendant positively denied that he had ever made any promise (Record, pages 10 and 18), and in addition thereto produced a letter admitted to have been written by defendant in error (Record, page 18) which tended to show that she, offended by some action of her lover, had herself broken off whatever

relations may have existed between them. Substantiating the intimations of this letter, a young man named Gaos testified (Record, page 18) that at a social dance some six or seven months previous to the time of his testimony the defendant in error had stated to him that all relations between her and Ortega had ceased. The trial took place on January 4th and 5th, 1905, and Ortega testified he had been married in Spain on October 6th, 1904, which was only three months previous to the trial —so that such statement could not have been influenced by her lover, if he was one, having been already married.

Whatever may be the comparative weight to be given to these various items of testimony, we submitt that the state of evidence was not such as to warrant the trial judge in taking the issue from the jury as to the existence of the alleged contract to marry, but the same should have been submitted for *their* determination under proper instructions. The rule which marks the dividing line between the state of evidence requiring an issue to be submitted and that allowing the judge to say that there is no competent evidence to sustain more than the one view is so well settled by the decisions of this court that citation of those decisions is unnecessary.

VII

There remain but one or two closing suggestions.

It may be argued by counsel for defendant in error that the motions in arrest of judgment and for judgment *non obstante veredicto* were not filed in time, in view of a Rule of Court limiting the time to ten days after verdict. But the application of its rules in particular cases is always

subject to discretionary action on the part of the judge presiding, and the court will observe that the wording of the order ruling upon said motions (Record, page 7) shows that they were considered upon their merits by the trial court, the language being "the said motions being now argued *and considered* by the court", whereby it clearly appears that the objections of the plaintiff's counsel to the filing thereof were also overruled.

It may also be argued that a motion for a judgment *non obstante veredicto* on behalf of a defendant is not permitted. We can see no reason for a distinction in that respect between the parties, and the right to file such motion under like circumstances is supported by the case of

Usher vs Scranton R'y. Co., 132 Fed, Rep. 405

We therefore respectfully ask that the judgment of the court below be reversed for the errors assigned, and a new trial be ordered.

N. B. K. PETTINGILL

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

v.

ANGELA LARA, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

Supplemental and Reply Brief for the Plaintiff in Error.

ALLEGED DEFECTS IN RECORD.

The authorities cited in the brief of defendant in error in support of the contention that the plaintiff in error should not be permitted to prosecute the writ of error further because of the absence from the record in this court of a copy of the bond required in connection therewith tend to support the action of the Chief Justice at the hearing in suggesting that the interests of the plaintiff in error would not be allowed to suffer for lack of an opportunity to supply such formal defects as there may be.

O'Reilley *v.* Edrington, 96 U. S., 724.

Dodge *v.* Knowles, 114 U. S., 430.

There might also be cited the recent action of this court in several other cases.

The fact that citation was duly issued and served (R., 46) and the failure of the defendant in error to unite in the request contained in the motion of plaintiff in error for a postponement of the hearing for a sufficient time to perfect the record in respect to the bond indicate that a bond was in fact given, and that it was a mere inadvertence on the part of the clerk of the court below that a copy thereof does not appear in the record. However this may be, any defect or defects existing will be promptly remedied by the plaintiff in error.

BILL OF EXCEPTIONS.

The bill of exceptions concludes with the statement that "the foregoing testimony constitutes the substance of all of the material evidence in the case."

Preceding this conclusion there is a statement in logical order of the testimony introduced, including the following recitations, to wit:

"And thereupon the plaintiff, to maintain the issues upon her part, called as a witness in her behalf the defendant," etc. (R., 13).

"Plaintiff, further to maintain the issues on her part, was sworn as a witness in her own behalf," etc. (R., 24).

Similar introduction is given to the testimony of each of the witnesses until the end of her testimony-in-chief, which concludes with the expression, "And thereupon plaintiff rested her case" (R., 27).

"Whereupon the defendant, to maintain the issues on his part, was sworn as a witness in his own behalf and testified," etc. (R., 27).

This testimony is followed by—

"And the defendant, further to maintain the issues on his part, produced as a witness" (R., 28), etc.

The testimony of his second witness is followed by—

"And thereupon the defendant rested his case and plaintiff in rebuttal offered in evidence the letter," etc. (R., p. 29). * * *

"And further in rebuttal, the plaintiff is called as a witness in her own behalf," etc. (R., 29).

At the conclusion of her testimony in rebuttal immediately follows the expression that—

"Thereupon the plaintiff again rested, and the foregoing constitutes the substance of all of the material evidence in the case.

"Thereupon the defendant moved the court for a peremptory instruction to the jury to bring in a verdict in favor of the defendant," etc. (R., 29).

In the case of Gunnison County Commissioners *v.* Rollins (173 U. S., 255-261), this court held that the character of recitations quoted above, exclusive of the general expression, were alone sufficient to authorize the court to conclude that a bill of exception contained all of the testimony, as a basis for an inquiry upon the record whether the trial court erred in giving a peremptory instruction for the defendant.

A bill of exception concluding with the declaration that the "substance of which whole evidence is included in the bill" was held to be good and sufficient.

Rockwell *v.* Capitol Traction Co. (25 Appeals D. C., 98).

There is, therefore, nothing in the suggestion by the defendant in error that the bill of exceptions is defective.

ACTION AND DEFENSE.

The complaint is for damages based upon a breach of a promise of marriage.

In the absence of a specification thereof, the residence of

the woman (in the case at bar, Porto Rico) is the place for the performance of a promise of marriage.

Graham *v.* Martin, 64 Indiana, 567.

In the former brief for plaintiff in error it was shown that, by section 8 of the act of Congress of April 12, 1900 (31 Stats., 77, 79), the laws of Porto Rico theretofore existing with respect to the subject in hand were declared to be and continued in full force and effect. And they remained in force as laws of Congress until, like any other legislation, they were repealed in part or in whole. The alleged promise of marriage was made June 1, 1900, after the act of Congress and before any act of repeal.

The charge of the court to the jury shows (R., 33 and 34) that the suit was brought and damages for breach of the alleged promise was based, not upon the law as it existed at the date of the alleged promise, but as it existed at the time of the institution of the suit and trial of the case.

Certain authorities were cited in our former brief to the effect that the existing law must be read into and forms a part of a contract, as of the time the same is entered into, and that a party cannot be deprived of his rights or defenses thereunder because of the impairment of the obligations of the contract.

In addition to those citations, it is deemed proper to refer to the following:

McCracken *v.* Hayward, 2 How., 608-619.

Sutherland, 2d ed., sec. 673.

Globe Refining Co. *v.* Landa Cotton Oil Co. (190 U. S., 540).

In McCracken *v.* Hayward (*supra*) it is held that—

"The laws in existence at the date of the contract form part of the contract, and are the measure of the obligations of the parties."

In section 673 of Sutherland it is stated that statutes passed in respect to imperfect and inchoate rights, where they "involve expense or interfere with the existing course of business, will not be construed to affect such rights or existing cases, or impose new duties or disabilities in respect of past transactions, unless the intention to do so is clearly expressed—even remedial statutes."

In the recent case of Globe Refining Company *v.* Landa Cotton Oil Company (*supra*) this court held (syllabus) that—

"In case of a breach of contract a person can only be held responsible for such consequences as may be reasonably supposed to be in contemplation of the parties at the time of making the contract," etc.

In this case the court, speaking through Mr. Justice Holmes, said:

"When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass * * * the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured."

Under the law as it existed June 1, 1900, therefore, if a promise of marriage was made, the limit of liability for future breach on the part of the plaintiff in error was the payment by him of the amount of such expenses as she might incur by reason of the promised marriage; and the amount of this liability cannot be increased without impairing the obligations of a contract.

The defendant in error cites Sturgis *v.* Crowninshield (4 Wheaton, 122-209) as an authority for the contention that the remedy may be modified without impairing such obligation. This case is inapplicable. The change in the remedy involved the relief of a defendant from the provision of a law requiring imprisonment, which was clearly proper, as such penalty in no sense formed a substantial part of the

contract, however much it may have tended toward facilitating the practical enforcement thereof.

The paragraph cited on behalf of the defendant in error from Cooley's Constitutional Limitations tends to confirm the contentions made on behalf of the plaintiff in error.

The point suggested on behalf of the defendant in error in connection with the citation of the case of Maynard *v.* Hill (125 U. S., 190, 211) is not only contrary to the theory of the complaint itself, but is also inapplicable to the case at bar. It involved not a promise to marry, but the validity of the act of the legislature of Oregon in dissolving the bonds of marriage theretofore actually consummated. The decision of this court, speaking through Chief Justice Marshall in the Dartmouth College case, is quoted therein to the effect that the provision of the constitution "has never been understood to restrict the general right of the legislature to legislate upon the subject of divorce." In the same paragraph of the decision, however, Chief Justice Marshall (4 Wheaton, 629) said that said provision did embrace "other contracts" "which respect property *or some object of value;*" and Justice Story, in his dissenting opinion in the same case (695-697), contended that it included consummated marriage contracts as well.

In the case of Laurence *v.* Miller (2 N. Y., 251) it was held, with respect to a contract of marriage, that the law of dower which existed at the time of marriage is the law of the contract.

ARTICLE 44 ALONE APPLICABLE.

The contention of defendant in error that articles 1088, 1089, 1093, and 1902 of the Civil Code in force in Porto Rico June 1, 1900, the date of the alleged promise of marriage, are applicable to the case is untenable.

In demonstrating the proposition that article 44 of said Code was the sole provision of law under which any recovery whatsoever could be had under the law at the time, it is

deemed proper to review the history of the enactment of article 43 of the same Code, the War Department translation of which reads as follows:

"Art. 43. Future espousals do not give rise to an obligation to contract marriage. No tribunal shall admit a complaint in which their fulfillment is demanded."

While not enacted by the proper authorities of Spain until 1888, or proclaimed as a law in Porto Rico until July 31, 1889, the provision is taken verbatim from article 47 of the report of 1851 of the result of the labors of eminent Spanish jurists who prepared and compiled the ground work of the Civil Code of Spain, and, in connection therewith, stated at length the basis for the civil law doctrine involved and the intent sought thereby to be accomplished.

In volume I of the report, as printed in Spanish in 1852, pages 55 *et seq.*, after referring to the laws of the various civil law countries on the subject, the author of the report, Don Florencio Garcia Goyena, Justice of the Supreme Court of Spain and Vice-President of the General Code Commission and President of the Civil Code Sub-Commission, says:

"Los esponsales de futuro eran las mas veces tan funestos à la moral, como contrarios à la santidad del matrimonio, y à la libertad con que debe ser contráido.

"En manos de un seductor hábil eran un arma para combatir la virtud de una jóven apasionada ó do inferiores circunstancias: en las de una muger artera é hipócrita de pudor eran un lazo para enredar à un hombre locamente enamorado: mas de una vez, los padres y tutores los empleaban para asegurar sus combinaciones de interés, de ambicion ó vanidad, comprometiendo anticipadamente à sus hijos ó menores.

"Eran tambien opuestos à la plena libertad de los matrimonios.

* * * * * * *

"Nuestro articulo 47 corta estos gravísimos inconvenientes, como tambien la delicada *cuestion del hecho y del derecho* en cuanto à la competencia del conocimiento. * * *

"El articulo, propuesto por mi à la Seccion del Código civil y por elia à la Comision general fué aprobado por esta como base, en sesion de 9de enero do 1844."

Translation.

"Promises of marriage are most times injurious to the preservation of good morals, to the sanctity of marriage, and to the liberty with which marriages should be contracted.

"In the hands of an able seducer, they may be used as a weapon against the virtue of a young woman in love, or of a woman in poor circumstances. In the hands of a skillful and dexterous, hypocritical woman they may be turned into an instrument to entice a man insanely in love. More than once, parents and guardians have made use of them to secure combinations, in which interests, ambition or vanity prevailed, by binding both parties beforehand.

"They are clearly at variance with the full liberty of marriage.

* * * * * * *

"Our Art. 47 puts an end to all these most grave evils, as well *as to all questions of fact and law on the subject.* * * *

"The article as prepared by me, and submitted to the Committee of Civil Code, and by it to the Commission in full, was approved by the latter January 9, 1844."

It thus appears that article 43 was intended by its framers to prevent any actions whatsoever from being founded upon a breach of promise of marriage, the theory of the fundamental civil law from which it was an outgrowth being that neither remedies of specific performance nor damages should be allowed to superinduce or tend to bring about the unhappy results so strongly presented in the report. And the enactment of this provision was subsequent to and constituted an epoch not covered by the doctrines laid down in Escriche.

With such a provision in the Code, involving as it did the principle governing Spain on the subject, nothing but the clearest statutory expression could be construed to embrace actions clearly contrary to the theory enunciated under the appropriate title in the Code.

There is no such provision in the Code of 1889 except article 44.

This article was not contained in the Commission's report of 1851, but seems to have been taken verbatim from article 54 of the Italian Civil Code, and to have been incorporated provisionally into the Spanish Civil Code project in 1882 for the first time. (See Scaevola Codigo Civil, Vol. II, pp. 75-76, published in 1899.)

The same commentator states that its enforcement has been unsuccessful, owing to an aversion on the part of those concerned to making public such matters and the difficulty in establishing "just cause."

It is believed that before the changes were made in the Civil Code, as it existed at the date of the alleged promise of marriage, no court could have construed articles 1088, 1089, 1093, and 1902, or any of them, as being applicable to or as supporting the action involved in the case at bar.

The trial court did not make any such claim, and the conclusions reached were based upon no such theory; on the contrary, immediately after the conclusion of the argument of counsel on the subject, in his charge to the jury, the court below said:

"It may be necessary to explain to the jurors who are natives of Porto Rico, the great change that took place in the law governing this class of cases when the sovereignty of Spain over Porto Rico was ceded to and assumed by the United States. Under the former regime, the Church and State were united. Contracts of marriage and also of engagements of marriage were regulated by the Church. There were known to be two kinds of marriages, one being a canonical marriage and the other a civil marriage. The Church had its way under Spanish Government by regulating the marriages. *One of the familiar customs enforced by the Catholic Church was that the banns of marriage were required to be published three successive Sundays in churches of the marrying couple.* If any person had an objection or claim against the proposed marriage there could be filed with the priest of the parish a remonstrance, and he would be obliged

to refuse to perform the marriage ceremony. That existed when the Church and State were united and where the people, as in Porto Rico, were then all of one denomination. Under these conditions a young man or woman would hesitate about breaking marriage engagements, because of creating an impediment to being married in the Church. All that ecclesiastical practice and rules, however, have now changed in Porto Rico. In Porto Rico, where the Church and State have now fortunately no connection and the laws passed by Congress of the United States and the Legislature of Porto Rico, and which latter wherever practical are to be followed and administered by the United States Court, govern and control the question of *marriage contracts, as in cases of any civil contract.*

"Therefore you are to judge and determine this case under the laws *now existing.* The law of Porto Rico, like the laws of the United States, regards a contract of marriage as a purely civil contract. It is to be judged by you as an ordinary contract, and if it has been violated, and whether a valid cause or excuse for its violation is proven." (Italics supplied.)

The contention that articles 1088, 1089, 1093, and 1902, or any of them, were applicable to the alleged promise of marriage at the date thereof is untenable; and the suggestion of the proposition but demonstrates the weakness and desperate character of the defense.

It follows, therefore, that article 44 is the only provision of law existing at the time of the alleged promise of marriage on which an action for breach of promise could have been based.

It is admitted, in argument, that the record proof does not show that the alleged promise was made "in a public or private instrument" or that "the banns" were "published." Both the record and the charge of the court show that it was not a promise of marriage within the meaning of article 44; and the court stated to the jury that there was no evidence to show that the defendant in error incurred any expenses by reason of the promised marriage.

The conclusion is irresistible, therefore, that the court

erred in peremptorily charging the jury that a promise of marriage had been proven and that the defendant in error was entitled to damages for a breach of promise.

CONCLUSION.

In conclusion, it is deemed proper to say that the legislation enacted for Porto Rico since 1900 involves a most radical change in conditions there in respect to the subject involved.

To sustain the action of the court below would accentuate the difficulties by giving a retroactive effect to the new statutes, so as to bring within its purview all engagements to marry made at any time prior to their enactment, whether the formalities of the then existing law (article 44) were complied with or not.

An act of Congress (if not a treaty of the United States) has been brought in question, and there is thus presented in good faith in the case at bar a Federal question, of which this court has jurisdiction under section 35 of the act of Congress approved April 12, 1900 (31 Stats., 77-79).

It is respectfully asked that the judgment of the court below be reversed for the errors assigned.

N. B. K. PETTINGILL,
GEORGE H. LAMAR,
Attorneys for Plaintiff in Error.

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Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

vs.

ANGELA LARA, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES DISTRICT COURT FOR PORTO RICO.

MOTION FOR CONTINUANCE.

N. B. K. PETTINGILL,
GEORGE H. LAMAR,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21222

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR.

vs.

ANGELA LARA, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES DISTRICT COURT FOR PORTO RICO.

MOTION FOR CONTINUANCE.

Now comes the plaintiff in error, by N. B. K. Pettingill and George H. Lamar, his attorneys, and moves the court for a continuance or a postponement of the above-entitled cause:

1. Because it has been discovered since the case has been placed on the assignment for hearing that the supersedeas bond required by the court below was not transmitted by the clerk of said court as a part of the record of this court; and that the order allowing the writ of error (see Record, 10) directed that the bond should be approved by the clerk; and it is deemed desirable that said defects in the record and any possible defects in the bond should be cured before the

case is heard by this court, and a reasonable time to perfect the record in this regard is craved.

2. Because defendant in error has not filed with the clerk of the court copies of his brief or argument three days before the case is called for hearing, as required by section 3 of rule 21.

N. B. K. PETTINGILL,
GEORGE H. LAMAR,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, A. D. 1905.

No. 230.

ANTONIO ORTEGA, *Plaintiff in Error,*
vs.
ANGELA LARA, *Defendant in Error.*

Notice of Motion for Continuance.

SIR: Please take notice that the plaintiff in error in the above-entitled cause will, on the 17th day of April, 1906, between the hours of twelve o'clock noon and one o'clock p. m., or as soon thereafter as counsel can be heard, in the Supreme Court Room, in the city of Washington, District of Columbia, in open court, move this court for continuance herein, for the following reasons, to wit:

First. Because it has been discovered, since the case has been placed on the assignment for hearing, that the supersedeas bond required by the court below was not transmitted by the clerk of the said court as a part of the record of this court; and that the order allowing the writ of error directed that the bond should be approved by the clerk; and it is deemed desirable that the said defects in the record and any possible defects in the bond should be cured before the case

is heard by this court, and a reasonable time to perfect the record in this ragard is prayed.

Second. Because the defendant in error has not filed with the clerk of the court copies of the brief or argument three days before the case is called for hearing, as required by section 3 of rule 21.

Dated Washington, D. C., April 16, 1906.

Very respectfully,

N. B. K. PETTINGILL,
GEORGE H. LAMAR,
Attorneys for Plaintiff in Error,
Fendall Building, Washington, D. C.

To FREDERIC D. MCKENNEY, Esq.,
Attorney for Defendant in Error, Washington, D. C.

Service accepted of copy of the aforesaid motion for continuance this 17th day of April, 1906.

F. D. MCKENNEY.
Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

vs.

ANGELA LARA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiff below, Angela Lara, defendant in error here, sued Antonio Ortega, the plaintiff in error here, in the district court of the United States for the District of Porto Rico to recover damages in the sum of ten thousand dollars ($10,000), alleged to have been suffered by her by reason of his breach of promise of marriage.

The complaint was filed October 14, 1904 (1), and on November 23, 1904, defendant appeared and demurred to the proceeding (2, 3). His demurrer having been overruled, on December 13, 1904, he answered by pleading the general issue (3), and, upon issue joined before the honor-

able district judge and a jury, verdict was rendered January 5, 1905 (4), and judgment was entered January 6, 1905 (5), in favor of the plaintiff and against the defendant "in the sum of $5,000" (5).

It is averred in the declaration that both plaintiff and defendant "are subjects of the King of Spain and residents of Porto Rico" (1); that on or about the first of June, A. D. 1900, the plaintiff, being then *sole* and unmarried, at the request of defendant promised to marry him, on request, and the defendant promised to marry her within a reasonable time (1); that plaintiff, confiding in said promise, has since remained *sole* and unmarried, ready and willing to marry the defendant, but the defendant, contrary to his said promise, in the year 1904 married a certain other person, to plaintiff's damage in the sum of $10,000 (2).

By his demurrer the defendant contended:

First. That the complaint did not state a cause of action within the jurisdiction of the court.

Second. That the complaint did not state a cause of action under the laws of Porto Rico (2).

Upon argument this demurrer was overruled by the court (3), and thereupon the defendant pleaded "that he never promised to marry the plaintiff," and two special pleas, which, however, he did not undertake to establish by proofs and which are conceded by the brief for the plaintiff in error not to be material to any of the issues before this court (Brief for P. E., p. 2).

The case came on for trial, and, a jury having been duly impaneled and sworn (4), evidence was introduced by each party, and the jury, having been instructed by the court upon the law of the case and having considered of their verdict, returned the same as follows:

"We, the jury, assess the damages in favor of the plaintiff in the sum of $5,000 (five thousand dollars)" (4).

On the next day, January 6, 1905, judgment was entered upon the verdict in favor of plaintiff "for the sum of five thousand dollars ($5,000), with interest thereon at six per cent. (6%) per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, to be taxed by the clerk" (5).

On January 16, 1905, ten days after the judgment in favor of the plaintiff had been duly entered of record and eleven days after verdict, the defendant filed a motion in arrest of judgment (5, 6) and a motion for judgment *non obstante veredicto* (6, 7).

To the filing of each of said motions "exception was duly taken by the plaintiff," and said motions, having been argued and considered by the court, were on the 20th day of January, 1905, overruled (7).

To the action of the court in overruling such motions the defendant excepted (7).

On the same day, defendant having assigned errors and petitioned for the allowance of a writ of error from this court to review the above judgment, the petition for the writ of error was allowed, to act as a supersedeas upon the giving of bond in the sum $8,000, "with good and sufficient sureties to be approved by the clerk (7).

The transcript of record does not contain the copy of any bond and, so far as now apepars, the writ of error has not been perfected by compliance with the statutory requirements in that regard.

The bill of exceptions does not contain all of the evidence given in the course of the trial, but, on the contrary, it purports to contain only "the substance of all the material evidence in the case" (19).

In her own behalf plaintiff introduced in evidence thirteen letters, which were admitted by the defendant as having been written by him to the plaintiff (10-15).

To the introduction in evidence of six of these letters, numbered from 1 to 6, inclusive, defendant objected "on the ground that they were dated in the year 1894 without any offer on the part of the plaintiff to show any connection between said letters and those of more recent date" and because the dates of said letters "were too remote from the date of the contract as alleged in the declaration" (16).

These objections were overruled by the court, and its action in that regard was duly excepted to by defendant. This exception forms the basis of assignment of error numbered II.

Plaintiff testified that she had known defendant since 1893; that he had professed love for her; had spoken to her of marriage and of the time when they would marry; that their engagement was formally made; that defendant had with her permission written a letter to her father (No. 7, R., p. 12), asking his permission to call upon her at the house, and at the same time defendant gave her his promise to marry her; that she had never consented to the breaking off of the engagement to marry defendant, which had been made known to her friends and was generally known publicly; defendant first promised to marry her in 1899 and renewed his proposal in 1900, when she accepted his proposal and his engagement ring; defendant then said he would marry her during the ensuing year, but from time to time gave various excuses for postponing the ceremony (16).

Fernando de Lara, father of plaintiff, testified that he had known defendant for six or seven years; that in 1899, a few days after receiving from the defendant one of the letters introduced in evidence, he requested him to call at his house, and, having referred to said letter, defendant affirmed his intention of marrying plaintiff and promised witness to marry her the following year (17).

The defendant Ortega, called as a witness, admitted that he had known the plaintiff for more than ten years; that

he had visited her occasionally, not "as the fiancé of the plaintiff, but for the purpose of finding out whether plaintiff would suit him for a wife and whether he loved her, but he never spoke to her of matrimony;" that on one occasion he had told plaintiff's father that "he had the best of intention, but could make no promises, because he needed to know plaintiff better and (to) see whether they agreed in character and would make a happy couple;" that he left Porto Rico in June, 1904, for New York and Europe and married, in Spain, October 6, 1904, just before returning to Porto Rico (10); that "SEVERAL TIMES BEFORE LEAVING FOR NEW YORK WITNESS TALKED WITH THE PLAINTIFF ABOUT THEIR COURTSHIP FOR THE PURPOSE OF BRINGING THE SAME TO AN END BEFORE HIS DEPARTURE, BUT NO DEFINITE CONCLUSION WAS ARRIVED AT" (18).

At the conclusion of the evidence defendant moved the court to instruct the jury to return a verdict in his favor because—

1st. No damages recognized by the law had been proven.

2d. Because the court has no jurisdiction of a suit where both plaintiff and defendant are subjects of the King of Spain.

3d. Because the cause of action in suit arose in June, 1900, "at which time there was no provision in the laws in force in Porto Rico for a suit of the character set out in plaintiff's declaration, the only basis for the said suit being the provisions of article 44 of the Civil Code then in force."

which motion was overruled and exception to such action was duly noted (19). Upon this exception is based assignment of error numbered III (8).

Thereupon, at plaintiff's request, the court instructed the jury that the testimony showed beyond reasonable doubt

that there was a promise and contract of marriage, and that their entire consideration "of the case should be confined to the question of damages, if any have been sustained by the plaintiff;" to which ruling defendant excepted (20), and this exception forms the basis of assignment of error numbered IV (9).

Assignment of error numbered I relates to the overruling of defendant's demurrer to the declaration, while number VI and VII relate to the overruling of the motions in arrest of judgment and for judgment *non obstante veredicto* respectively (9). Assignment of error number V, being merely that the court erred in entering judgment in favor of the plaintiff and against defendant, is too general to require discussion.

ARGUMENT.

The questions presented for the consideration of this court are:

First. The jurisdiction of this court to review the judgment of the trial court.

Second. The jurisdiction of the trial court to entertain the suit.

Third. If the requisite jurisdiction be found, does the transcript of record present reversible error?

FIRST.

Apart from the question as to whether this court has jurisdiction of this cause on its merits, it is submitted that the plaintiff in error ought not to be allowed to prosecute further the writ of error herein because of his failure to per-

fect said writ of error by giving bond, as required by the Revised Statutes of the United States, section 1009.

Boyce *vs.* Grundy, 6 Peters, 777.
First National Bank *vs.* Omaha, 96 U. S., 737.
Dodge *vs.* Knowles, 114 U. S., 430.
Gallaway *vs.* State National Bank, 186 U. S., 177.

It is not within the power of the trial judge to delegate the approval of such bonds to the clerk of the court, as was sought to be done in the case at bar (7).

O'Reilly *vs.* Edrington, 96 U. S., 724.
First National Bank *vs.* Omaha, 96 U. S., 737.
Haskins *vs.* St. Louis, &c., R. Co., 109 U. S., 106.

This court is also without jurisdiction to review the judgment of the lower court because—

1st. The matter in dispute, exclusive of costs, does not exceed the sum of $5,000.

2d. During the course of the trial neither the Constitution of the United States nor a treaty thereof nor an act of Congress was brought in question and the right claimed thereunder denied.

The judgment herein was for $5,000, with interest and costs. Apart from so-called Federal questions in an action for money, the amount of the judgment against the defendant is the measure of the jurisdiction of this court, and such jurisdiction cannot be maintained unless the judgment exceeds $5,000.

Mayor, &c., of Troy *vs.* Evans, 97 U. S. (7 Otto), 1.

Neither interest nor costs of suit can enter into the computation.

Western Union Tel. Co. *vs.* Rogers, 93 U. S. (3 Otto), 565.

Plaintiff in error concedes that the amount in dispute is not sufficient to support the jurisdiction of this court (Brief P. E., 6), but insists that "a *bona fide* question" of Federal law is involved, in that he was unjustly deprived by the trial court of the benefit of the provisions of section 44 of the "former Civil Code of Porto Rico," which had been continued in force by virtue of the provisions of section 8 of the act of Congress of April 12, 1900, called the Foraker act.

Section 44 of the "former Civil Code of Porto Rico" related to breaches of promise of marriage, and declared that under certain conditions "the person who refuses to marry without just cause, shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage."

This law of Porto Rico, being in force on April 12, 1900, was by section 8 of the Foraker act continued in force "until altered, amended or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

As so continued it was in force June 1, 1900, the alleged date of the promise of marriage between the parties to the suit.

Subsequent to June, 1900, and prior to October, 1904, the date of the alleged breach—that is to say, in 1902—the legislature of Porto Rico enacted a new Civil Code, which is known as "The Civil Code of Porto Rico," and became effective July 1, 1902.

By the "Final Provision" of "The Civil Code of Porto Rico" the former "Civil Code and all other laws or bodies of law which directly or indirectly are in conflict with the provisions of this revised Civil Code" were repealed and left without force or effect, "both as laws directly binding and as supplementary laws."

This provision directly repealed section 44 of the prior Civil Code upon the continued existence or effect of which plaintiff in error now relies to maintain the present writ of error.

In addition to said section 44 now repealed the Civil Code in force prior to 1902 contained the following captions and articles thereunder:

Book Fourth.—Obligations and Contracts.

Title I.—Obligations.

Chapter First.—General Provisions.

Article 1088. Every obligation consists in giving, doing, or not doing something.

Article 1089. Obligations are created by law, by contracts, by quasi-contracts, and by illicit acts and omissions or by those in which any kind of fault or negligence occurs.

Article 1093. Those (obligations) arising from acts or omissions, in which faults or negligence, not punished by law, occur, shall be subject to the provisions of chapter second of title sixteen of this book.

Title XVI.

Chapter Second.—Obligations which Arise from Fault or Negligence.

Article 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

These four articles have been carried into and now form a part of the Revised Code of 1902 in the very words above quoted.

See sections 1055, 1056, 1060, and 1803 of The Civil Code of Porto Rico, 1902.

Prior to the Revised Code of 1902 the law in force in Porto Rico recognized two forms of marriage, the canonical and the civil. Each form when effected constituted a "contra-

to solemne"—that is, a contract required by law to be made with peculiar solemnity or in a particular form. As such they correspond with our formal contracts for the transfer of title to or an interest in real property, and are distinguishable from "contratos consensuales," which arise from the mere assent of the parties, and may be evidenced by word of mouth, without formal writings.

By section 129 of the Revised Code of 1902 marriage is declared to be "a civil institution originating in a civil contract, whereby a man and a woman mutually agree to become husband and wife and to discharge toward each other the duties imposed by law," &c., &c.

It thus appears that both at the date of the promise of marriage between the parties at bar and at the date of the breach thereof, in October, 1904, marriage was an institution originating in contract, and for the breach of the contract (promise) to marry an action would lie.

Articles 43 and 44 and 1088, 1089, 1093, and 1902 of the former Civil Code.

Articles 1055, 1056, 1060, and 1803 of the Civil Code of 1902.

Section 6 of Code of Civil Procedure of Porto Rico, approved March 10, 1904; in force July 1, 1904.

The sole difference in the law governing an action for a breach of promise of marriage where the breach occurred prior to 1902 and that governing such an action for a breach occurring subsequent to that year grows out of the repeal of section 44 of the old Civil Code to the effect that—

"If the promise has been made in a public or private instrument * * * or when the banns have been published, the person who refuses to marry, without just cause, shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage. An action to recover indemnity for the expenses to which the foregoing article refers may be instituted only within a year, counted from the day of the refusal to celebrate the marriage."

As it does not appear from the record that the promise in the case at bar was either made in a public or private instrument, or that the banns had been published, it would seem that this section which provided for the recovery of special indemnity in cases where "expenses" had been incurred had no bearing. In any event, it is nowhere intimated that the right of the injured party, where the promise had been evidenced by special formalities, to sue for and recover "expenses" was exclusive of the right in the same party to sue for and recover other damages suffered by reason of the breach (art. 1902, Civil Code of 1889). The right to recover "expenses" which had been incurred under the specially enumerated conditions was in addition to and not in derogation of the common rights and obligations incident to the making and breaching of contracts *inter partes*. It would be strange indeed if a promisee in the case of a contract of purchase or a lease, easement, or mortgage should have greater rights in compelling compensation for damages flowing from a breach of such a contract than would the promisee in the case of a broken promise or contract to marry.

This, however, seems to be the contention of the plaintiff in error, who insists that the refusal of the trial court to limit the plaintiff's right of recovery by the express terms of said section 44 amounted to the denial of a right claimed under a statute of the United States.

Where the amount in dispute does not exceed $5,000, to give this court jurisdiction it must appear that a real and not a fictitious Federal question is involved. It is not enough that the plaintiff in error shall have asserted that a Federal question was raised in the course of the trial, but it must appear that the alleged Federal question is of a substantial character.

If it should be conceded that prior to 1902 the sole remedy of an injured party in such a case as this was an action to

recover "expenses," it is certain that no such restriction existed subsequent to that date. The right of the legislature to alter and enlarge the remedy for a breach occurring prospectively cannot be doubted. The rights of the parties to the contract were not altered; the remedy accorded for a breach if its obligation alone was affected. It the case at bar no cause of action is asserted as arising from the promise or agreement to marry, but only from the refusal to perform. The refusal to perform is the fact which gave rise to and supports the action, and the law governing the results of such refusal must be that in force when the refusal occurred. This conclusion results from the following considerations: The promise of marriage by itself in the absence of a breach thereof would not give rise to an action for damages either limited or general. In general actions existing but not instituted are governed by the laws in force at the time of their institution and not by prior laws. The laws of procedure or adjective laws may have retroactive effect in that they may be applicable to cases existing under prior laws, but not yet submitted to the jurisdiction of any court. In cases of specific performance of contracts and the like it is plain that the laws in force at the time of the making of the contract alone must determine the outcome, but in actions to recover damages for the breach of contracts not compulsorily executable the right to maintain such action and the measure of the damages depends upon the law in force at the time the fact—*i. e.*, the breach—giving rise to the right of action occurs.

The parties to a contract have no vested right in the existing general laws of the State which can preclude their amendment or repeal. While it is true that there may be laws which when accepted by an individual constitute in themselves binding contracts which probably could not be altered by subsequent legislation, it is settled in the United States that the laws governing the institution of marriage and the dissolution of the condition are not of this class.

Maynard *vs.* Hill, 125 U. S., 190.

Changes in the laws of evidence, of perjuries and registrations, and those which concern remedies, frauds, and limitations of actions, while they may affect the validity, construction, or discharge of contracts, are not regarded as necessarily affecting their obligation.

Sturges *vs.* Crowninshield, 4 Wheaton, 122, 200.

Cooley's Constitutional Limitations, 7th ed., 406 *et seq.*

By section 8 of the Foraker act, article 44 of the old Civil Code was only continued in force until altered, amended, or repealed by the legislature of Porto Rico. More than two years prior to the institution of the present suit it had been expressly repealed by the Civil Code of Porto Rico of 1902. To suggest that it survived for the purposes of this suit and that the refusal of the trial court to be bound thereby amounted to the denial of a right claimed under that act of Congress would seem to be the assertion of a fictitious Federal question, which for lack of substance cannot support the writ of error.

SECOND.

But if the court should think otherwise, then we submit that the objection to the jurisdiction of the trial court is not well founded.

The complaint asserts that both parties to the cause are subjects of the King of Spain and residents of Porto Rico. Section 3 of the act of Congress of March 2, 1901 (31 Stats. L., 953), declares that the jurisdiction of the district court of the United States for Porto Rico in civil cases shall * * * extend to and embrace controversies where the parties or either of them are * * * citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interests or costs, the sum or value of one thousand dollars.

As the case at bar is clearly comprehended by the express words of this act, further discussion of this point would seem to be unnecessary.

THIRD.

Assuming that the district court had jurisdiction of this cause, and that this court has jurisdiction to review the judgment of the former on writ of error, it would seem that the matters of error now relied upon to secure a reversal of that judgment are as follows:

a. Because the complaint did not set forth facts sufficient to constitute a cause of action under the laws of Porto Rico.

b. Because of the admission in evidence of the letters numbered from 1 to 6, inclusive.

c. Because the trial judge instructed the jury peremptorily in favor of the plaintiff in so far as the right to recover against defendant was concerned.

d. Because of the overruling of the motions in arrest of judgment and for judgment *non obstante veredicto*.

a.

At the date of the institution of this suit matters of procedure in the courts of Porto Rico were regulated and controlled by the Code of Civil Procedure of Porto Rico approved March 10, 1904, in effect from and after July 1, 1904.

Section 6 of said Code expressly recognizes the right of an injured party to maintain an action for breach of promise of marriage.

By section 101 pleadings on the part of the plaintiff are limited to (1) the complaint and (2) the demurrer to the answer. On the part of the defendant to (1) the demurrer to the complaint and (2) the answer—

Section 103 provides that the complaint must contain (1) caption and title, (2) "a statement of facts constituting the cause of action, in ordinary and concise language," and (3) a demand for the relief claimed.

Section 122 requires that in construing a pleading "for the purpose of determining its effect its allegations must be liberally construed with a view to substantial justice between the parties."

Section 123 provides for the striking of redundant matter from pleadings, and section 124 requires the court "in every state of an action (to) disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affirmed by reason of such error or defect."

In actions for breach of promise the only issuable facts are—

(1) The promise to marry.

(2) The terms, if any.

(3) The breach.

Any averments of facts or circumstances in addition to the above would be redundant.

McCarville *vs.* Boyle, 89 Wisconsin, 651.

The complaint here asserted (1) the promise of plaintiff to marry defendant (2) within a reasonable time in consideration of the promise of plaintiff to marry defendant upon request, (3) the defendant's breach by his marriage to another in 1904, and concludes with a demand for damages in a sum certain. It is submitted that this complaint fully complies with all requirements of the laws of Porto Rico and well states a cause of action within their purview.

b.

The letters numbered from 1 to 6, inclusive, were properly introduced in evidence. The sole objection urged to their admissibility is that they were long prior in date to the alleged promise of marriage between the parties, and no connection between them and the letters of more recent date was shown.

But the defendant admitted the authenticity of the letters and his continued acquaintance with plaintiff from their dates to the time of trial. The letters were admissible in evidence as tending to show the state of his feelings, or at least his representations thereabouts, for the plaintiff long prior to the day when she yielded to the persistent pressure of his attentions. No attempt was made on the part of the defendant to show that his state of mind had altered between the date of those letters and the date of his becoming engaged to their addressee.

It is true that no offer was made on the part of the plaintiff to introduce any letters received by her between 1894 and 1900 or to show the connection, if any there was, between those of the earlier and those of the later date. But it may well be that the letters produced by plaintiff were all that ever passed between the lovers, and in any event it was incumbent upon the defendant to demand the introduction of the entire correspondence if its partial introduction affected him disadvantageously.

That the letters introduced antedated the alleged promise of marriage is of no consequence.

Richmond *vs.* Roberts, 98 Illinois, 472.

c.

The peremptory instruction of the trial court in favor of the plaintiff was fully justified by the state of the evidence.

There is no conflict in the evidence upon the material fact as to the existence of an "understanding" or engagement of marriage between the parties.

In his letter of June, 1902 (number 7), to Senor Lara defendant expressly declares the existence of "a certain understanding" between himself and the plaintiff, Angela, which he deems it his duty to make known to the father, and, "duly authorized by her," he requests permission to visit the dwelling-house at opportune times (12). In his letter of September 10, 1903 (number 11), to Senor Lara he informs him that he deems it his duty "to make a parenthesis in my (his) relations with your daughter Angelis, and to consider them as terminated" so as not to prejudice her "for any longer time by keeping her in such an indefinite state of affairs," saying that "I could not make her happy in my actual condition, and with great pain in my heart I deprive myself of her affection, which has always been to me so ineffable" (14).

On the stand as a witness in his own behalf he admitted the existence of an engagement of marriage between them, at least impliedly, when he testified that prior to leaving for New York on several occasions he had "talked with the plaintiff about their courtship for the purpose of bringing the same to an end before his departure, but no definite conclusion was arrived at" (18). It might well be that defendant had never spoken to plaintiff "of matrimony" in the abstract, and yet an engagement of marriage had existed between them. The bill of exceptions does not purport to contain the entire testimony, but if it were otherwise, still the action of the trial judge here complained of would have been fully justified.

Patillo *vs.* Allen-West Commission Co., 131 Fed. Rep., 680, 686.

Citing

Southern Pacific Co. *vs.* Pool, 160 U. S., 438, 440.

Union Pacific Railroad Co. *vs.* McDonald, 152 U. S., 262, 283.

Delaware, &c., Co. *vs.* Converse, 139 U. S., 469, 472.

d.

The motions in arrest of judgment and for judgment *non obstante veredicto*, if they were made in due season, do not present any other supposed grounds of error than those above discussed. Hence, if they had been filed in time, they were without merit and were properly overruled. As it was, they were attempted to be made against the protest of plaintiff after judgment had been entered of record and after the expiration of ten days supposed to be allowed by the rules of court for such purpose.

In the absence of a statute or rule of court to the contrary, motions in arrest of judgment must always be made before judgment.

State *vs.* Kibbling, 63 Vermont, 636.
Keller *vs.* Stevens, 66 Maryland, 132.
Hilligoss *vs.* Pittsburgh, &c., Co., 40 Indiana, 112.
Patter *vs.* McCormick, 127 Indiana, 439.

And so is it also with motions for judgment *non obstante veredicto*.

Scheible *vs.* Hart (Kentucky), 12 S. W. Rep., 628.
State *vs.* Commercial Bank, 6 Smed. & M. (Miss.), 218.
Harrison *vs.* Great Northern, &c., Co., 11 C. B., 542.
Beatty *vs.* Warren, 4 M. & G., 158.

This writ of error should be dismissed for the want of jurisdiction on the part of this court, or if not, then the judgment of the lower court should be affirmed.

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Attorneys for Defendant in Error.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
APR 23 1906
JAMES H. McKENNEY,
Clerk.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

vs.

ANGELA LARA.

SUPPLEMENTAL MEMORANDUM FILED BY DEFENDANT IN ERROR.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
T. D. MOTT, JR.,
For Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21294

PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

vs.

ANGELA LARA.

UPPLEMENTAL MEMORANDUM FILED BY DEFENDANT IN ERROR.

'o defeat the action the plaintiff in error relies upon the visions of articles 43 and 44 of the Civil Code in force in to Rico between 1889 and 1902, which articles are as fol-s:

Art. 43. Future espousals (esponsales de futuro) do not rise to an obligation to contract marriage. No tribunal ll admit a complaint in which their fulfillment is de-nded.

Art. 44. If the promise (la promesa) has been made in a lic or private instrument by a person of age, or by a minor he presence of the person whose consent is necessary for celebration of the marriage, or when the banns have been lished, the person who refuses to marry, without just se, shall be obliged to indemnify the other party for the enses (los gastos) which he or she may have incurred by on of the promised marriage.

"An action to recover indemnity for the expenses to which the foregoing article refers may be instituted only within a year counted from the day of the refusal to celebrate the marriage."

But the fact that by article *43* it is provided that no tribunal shall admit or maintain jurisdiction of a complaint to compel the fulfillment of a contract of marriage—that is, an action in the nature of a bill for specific performance—and notwithstanding the fact that article *44* in the event of a breach gives a special right of action to recover expenses (los gastos), it does not at all follow that the aggrieved party cannot, in addition to the action for expenses, or apart from it, maintain an action against the recalcitrant promisor to recover damages (daños y perjuicios).

In this connection reference is made to Escriche Diccionario Razonado de Legislacion y Jurisprudencia, 1876, where, under the title "Esponsales,' the following occurs:

"ESPONSALES—the promise of marriage mutually made between a man and a woman with reciprocal acceptances (Law I, title I, part IV). They are called 'esponsales' (espousals), from the Latin word *spondeo*, which means to promise."

I.

Formerly there were two different kinds of "esponsales," to wit, "esponsales de presente" and "esponsales de futuro." * * * There now remains solely the "esponsales de futuro" (future espousals), which are those which are defined and treated of in this article. * * *

IV.

The "esponsales" produce two effects, namely: The first one is the mutual obligation to marry; but this obligation is not absolute and efficacious, since, if one of the two "esposos" (promisors) refuses to fulfill the said obligation, the ecclesiastical judge has no power to enforce the same except indirectly by refusing to grant him or her a license to marry some other person. "*Sponsus qui fidem datam sine justa causa recusat ademplire, monendus est potius quam cogendus,*" said the Pope Lucius the III, "*siquidem coacta matrimonia tristes infelices exitus habere solent.*" But although the "esposo" (promisor) who refuses to fulfill his promise cannot be compelled to so do, he can nevertheless be condemned by the secular judge to indemnify the "esposa" from the damages (perjuicios) suffered by her on account thereof. The second effect consists in a kind of affinity supposed to be of "public honesty" springing by virtue of the "esponsales" between the "desposados" (betrothed) and the relatives of the other one, so that neither the relatives of the "esposo" (man) can marry the "esposa" (woman) nor the relatives of the "esposa" can marry the "esposo." This impediment was formerly a bar even if the "esponsales" were void, but the "Concilio de Trento" entirely abolished the same in the cases where could be some nullity affecting the "esponsales" and limited the said impediment to the first degree when the "esponsales" were validly contracted (*Sess. 24, De Reform mtr., chap. 3*).

VI.

Cognizance of the cases regarding the effectiveness of the "esponsales" or their rescissions, as well as regarding the obligation which binds the contracting parties, corresponds to the ecclesiastical jurisdiction (Law VII, title I, part IV), while the cases concerning the damages and prejudices (daños y perjuicios) which the "desposado" (promisor) who, without just cause, refuses to fulfill his promise ought to pay to the other belong to the secular tribunals only, because they are merely temporal and worldly matters, just as in cases of divorce the ecclesiastical judges are forbidden from interfering in cases relating to the restitution of the dowry, matrimonial properties, judicial fees, and alimony (Law XX, title I, liber II, Nov. Rec. See *Divorce*).

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For Defendant in Error.

Supreme Court of the United States.

No. 230.—October Term, 1905.

Antonio Ortega, Plaintiff in Error, *vs.* Angela Lara. } In error to the District Court of the United States for the District of Porto Rico.

[May 21, 1906.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

Angela Lara brought her action against Antonio Ortega in the District Court of the United States for the District of Porto Rico to recover damages alleged to have been suffered by her by reason of his breach of promise of marriage. The date of the promise was laid as June 1, 1900, and of the breach in 1904. Both parties were subjects of Spain and residents of Porto Rico.

Defendant demurred to the complaint, and the demurrer having been overruled, pleaded the general issue. The cause was tried by a jury and resulted in a verdict for plaintiff in the sum of $5,000, interest and costs, on which judgment was entered. Defendant moved in arrest and for judgment *non obstante veredicto*, which motions were overruled, and this writ of error was thereupon allowed.

At the conclusion of the evidence defendant requested the court to instruct the jury to find in his favor, on the grounds, among others, that the court had no jurisdiction of a suit where both plaintiff and defendant were subjects of the King of Spain, and because the cause of action arose in June, 1900, "at which time there was no provision in the laws in force in Porto Rico for a suit of the character set out in plaintiff's declaration, the only basis for the said suit being the provisions of article 44 of the Civil Code then in force." Similar reasons were assigned in support of the motions in arrest and *non obstante*.

1. The judgment was for $5,000 and costs. It carried interest, but it is the amount of the judgment that furnishes the test of our jurisdiction, and it is conceded that that is insufficient in this instance. But plaintiff in error contends that the refusal of the court below to limit the right of recovery by the terms of article 44 of the former Civil Code of Porto Rico amounted to the denial of a right claimed under a statute of the United States, and that jurisdiction may be maintained on that ground. Act March 3, 1885, 23 Stat. 443, c. 355, §§ 1 and 2; Act April 12, 1900, 31 Stat. 77, c. 191, § 35.

The treaty ceding Porto Rico to the United States was ratified by the Senate, February 6, 1899; Congress passed an act to carry out its obligations March 3, 1899; and the ratifications were exchanged and the treaty proclaimed April 11, 1899. Then followed the act of April 12, 1900, 31 Stat. 77, c. 191. At that date article 44 of the Civil Code of Porto Rico, relating to breaches of promise of marriage, was in force, and provided that under certain conditions "the person who refuses to marry without just cause, shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage."

By the general rule of public law, recognized by the United States, whenever political jurisdiction and legislative power over territory are transferred from one nation to another, the laws of the country transferred, intended for the protection of private rights, continue in force until abrogated or changed by the new government. Of course, in case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States so far as applicable would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue.

Nevertheless, and apparently largely out of abundant caution, the eighth section of the act of April 12, 1900, provided: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States; . . ."

In 1902 the legislature of Porto Rico enacted a new Civil Code, which went into effect July 1 of that year, and this repealed article 44 of the prior Civil Code, and carried forward several articles bearing upon the same subject.

It will be remembered that the alleged promise was in 1900 and the alleged breach in 1904. And now the argument is, that by reason of section 8 of the act of April 12, 1900, commonly called the "Foraker Act," article 44 became a law of the United States by adoption, and that, therefore, the ruling of the court below that recovery was not limited to expenses was equivalent to the denial of a right claimed under a law of the United States.

We do not agree with this view. Article 44 was a law of Porto Rico on April 12, 1900, and the operation of the Foraker act was to define how it might be amended or repealed.

It was repealed by the Porto Rican legislature before the alleged breach of promise. If the District Court erred in declining on any ground to

apply it as a limitation, the error cannot be corrected on this appeal, because the appeal does not lie.

The alleged Federal question had no existence in substance. The laws of Porto Rico remained the laws of Porto Rico except as indicated in section 8 of the Foraker act, which section did not make all the laws of Porto Rico acts of Congress.

We cannot perceive that "the Constitution of the United States, or a treaty thereof, or an act of Congress" was brought in question or a right claimed thereunder denied, within section 35 of the Foraker act, or that "the validity of a treaty or statute of or an authority exercised under the United States" was drawn in question within section 2 of the act of March 3, 1885.

2. By section 3 of the Act of March 2, 1901, 31 Stat. 953, c. 812, it was provided "that the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States."

The jurisdiction of the District Court, when the parties on both sides were the subjects of the King of Spain, has several times been sustained by this court, and we do not feel required in this case to make any other ruling.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.